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Vol. I
TRANSCRIPT OF RECORD

(Pages 1 to 467)

Supreme Court of the United States

OCTOBER TERM, 1963

No. 304

ELMER F. REMMER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 28, 1963

ANSWER RECEIVED NOVEMBER 12, 1963

No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes

Volume I
(Pages 1 to 448)

Appeal from the United States District Court
for the District of Nevada.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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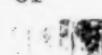
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For the Appellee.

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In the United States District Court
for the District of Nevada

No. 12,177

UNITED STATES OF AMERICA

vs.

ELMER F. REMMER.

INDICTMENT

The grand jury charges:

That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$9,500.00 and that the amount of tax due and owing thereon was the sum of \$2,570.00, whereas as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$33,734.61, upon which said net income he owed to the United States of America an income tax of \$16,259.54.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C. Section 145(b).

Second Count

The grand jury further charges:

That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who, during the calendar year 1944 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$9,500.00 and that the amount of tax due and owing thereon was the sum of \$2,570.00, whereas as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of \$33,734.60, upon which said net income there was owing to the United States of America an income tax of \$16,259.54. In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

Third Count

The grand jury further charges:

That on or about the fourteenth day of June, 1946, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly

attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$28,888.68, and that the amount of tax due and owing thereon was the sum of \$13,072.02, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$37,157.10, upon which said net income he owed to the United States of America an income tax of \$18,586.83.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

Fourth Count

The Grand Jury further charges:

That on or about the fourteenth day of June, 1946, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1945 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal

Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$30,429.68 and that the amount of tax due and owing thereon was the sum of \$14,074.29, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of \$38,708.09, upon which said net income there was owing to the United States of America an income tax of \$19,649.82.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

Fifth Count

The grand jury further charges:

That on or about the fifteenth day of March, 1948, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the

sum of \$11,244.79 and that the amount of tax due and owing thereon was the sum of \$2,776.87, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$94,235.84, upon which said net income he owed to the United States of America an income tax of \$61,341.68.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

Sixth Count

The grand jury further charges:

That on or about the fifteenth day of March, 1948, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1946 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$11,244.79 and that the amount of tax due and owing thereon was the sum of \$2,776.87, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-

property basis, was the sum of \$94,235.84, upon which said net income there was owing to the United States of America an income tax of \$61,341.68.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

A True Bill.

/s/ JAMES M. GLYNN,
Foreman.

/s/ MILES N. PIKE,
United States Attorney.

[Endorsed]: Filed April 9, 1951.

[Title of District Court and Cause.]

MOTION FOR A BILL OF PARTICULARS

The defendant by his attorneys, John R. Golden and Leslie C. Gillen, moves the Court to require the attorney for the Government to file a Bill of Particulars, on the ground that the indictment contains mere conclusions of law and fails to contain a plain, concise and definite written statement of the essential facts, constituting the offenses charged, in that it does not inform the defendant of the nature, kind and amount of each item claimed by the Government as making up the total gross income for Elmer F. Remmer and Helen L. Remmer, and each of them, for each of the years 1944, 1945 and 1946, and in that it does not inform the defendant of the

type and amount of each deduction against the claimed total gross income of Elmer F. Remmer and Helen L. Remmer, and each of them, for each of the years 1944, 1945 and 1946, which Bill of Particulars should particularly set forth the following with respect to each count in the indictment:

1. The nature or kind of each item claimed by the Government as making up the total gross income claimed to have been received by the defendant.
2. The source of each income item claimed by the Government to make up the total gross income claimed to have been received by the defendant.
3. The amount of each item claimed by the Government as making up the total gross income claimed to have been received by the defendant.
4. The type and amount of each deduction against the claimed total gross income of the defendant, allowed by the Government in computing the alleged net income of the defendant.
5. The type and amount of each deduction against the claimed total gross income of the defendant, disallowed by the Government in computing the alleged net income of the defendant.
6. Whether or not the amount of each item making up the total gross income claimed by the Government to have been received by the defendant, was made up from figures taken from the books of defendant, or from some other source or sources or a combination of such books and other sources.

7. If the amount of the total gross income claimed by the Government to have been received by the defendant is partly made up of items from sources other than the books of the defendant, the nature and amounts of each claimed by the Government to have been received by the defendant.

/s/ JOHN R. GOLDEN,

/s/ LESLIE C. GILLEN,

Attorneys for Defendant.

[Endorsed]: Filed April 27, 1951.

[Title of District Court and Cause.]

**COPY OF CRIMINAL DOCKET ENTRY
OF JUNE 15, 1951**

June 15, 1951: Hearing on Motion for Bill of Particulars. Ordered Motion is denied.

[Title of District Court and Cause.]

ARRAIGNMENT

Be It Remembered, That the above-entitled matter came on regularly for hearing before the Court at Carson City, Nevada, on Friday, the 27th of April, 1951, the plaintiff being represented by Mr. Miles N. Pike, and the defendant being present in court with his counsel, John R. Golden and William K. Woodburn of the firm of Woodburn, For-

man and Woodburn. The following proceedings were had:

Mr. Pike: This is the time set for arraignment of the defendant in the case of United States of America vs. Elmer F. Remmer, case No. 12,177. I would like to have the record show the presence in court of the defendant.

The Court: The record will show the presence of the defendant, with counsel. The clerk will proceed with the arraignment.

(Clerk hands copy of indictment to defendant and reads):

Q. (By the Clerk): Is that your true name?

A. That's right.

(Clerk continues reading.)

The Court: Is the defendant ready to plead at this time?

Mr. Golden: Before we plead, your Honor, may I point out to you that this is one of the new forms of indictment which gives the rule as to conclusion as to total amount of taxes allegedly fraudulently unpaid and therefore I prepared a motion for bill of particulars, which I would like to file and we are perfectly willing to plead, provided we may do so without prejudice to any further proceedings on this motion and any other motion directed to the same purpose.

Mr. Pike: Your Honor, I see no objection to that.

The Court: So then I take it, Mr. Golden, with

that understanding, of course, that any plea entered at this time does not prejudice motions filed or that can be filed, you are ready to plead.

Mr. Pike: Well, I understand the motion will actually be filed now, that it will be without prejudice to determination by the Court on the motion.

(Motion filed.)

Mr. Golden: With the understanding then that all rights under this motion and any further proceedings leaning toward further information as to the total contained in the indictment or further particulars are reserved and that plea may be without prejudice thereto, we are prepared to plead.

Mr. Pike: Well, your Honor, I don't know if it would go quite that far. I feel the motion would have to be filed at this time. I feel that the statement of counsel was a little broader than what is admissible by the rule.

Mr. Golden: What I mean, as I understand the practice, and of course it may be different in this district, we make our motion, then the government in answer thereto either comes in with a bill of particulars or a refusal to give a bill of particulars, and if we are not satisfied with what the government produces, then we address the Court, applying for further particulars.

The Court: I think that would be a reasonable understanding. If a bill of particulars was ordered by the Court or given by agreement or consent of counsel, and it didn't seem to include the matter that counsel had in mind, or which might be re-

quired by the rules or statute, I should think counsel would be entitled to move for clarification or additional bill of particulars.

Of course, I have no knowledge of just what the plea will be, but it has been my practice here that in the arraignment I consider it advisable to inform the defendant as to possible penalties under the count before he enters his plea, so the defendant is informed that for violation of the charge contained in Count 1, the defendant could be fined as much as ten thousand dollars or imprisoned as much as five years, or both said fine and imprisonment, on a plea of guilty or conviction after a trial and that penalty applies to each of the counts. I want the defendant to know that before he contemplates his plea. That, of course, is the maximum fixed by statute. That does not mean, of course, the Court would impose that sentence. The Court may impose anything less than, any fine or imprisonment less than that. I think it is my duty to inform the defendant of the penalty before a plea is contemplated. So now, Mr. Remmer, I understand you are ready to enter your plea.

A. Not guilty.

Q. You are not guilty as to the charge contained in Count 1, and what is your plea to the charge contained in Count 2 of the indictment?

A. Not guilty.

Q. Count 3? A. Not guilty.

Q. What is your plea to the charge contained in Count 4 of the indictment? A. Not guilty.

Q. And to the charge contained in Count 5?

A. Not guilty.

Q. And to the charge contained in Count 6?

A. Not guilty.

The Court: So plea of not guilty will be entered in each of the counts of the indictment. We will try to find a time for trial. My thought is, and I want counsel to know it and every one else to know it, that whenever a case of this character comes up, a case, I mean, charging violation of the laws of the United States, I will give it preference to civil cases now on the docket. Have you any idea as to preference about the trial, Mr. Golden?

Mr. Golden: It is quite agreeable to us to go along with Mr. Pike.

The Court: So trial of this action will be set for Tuesday, November 7, 1951, in this court room at Carson City, Nevada, with a jury, at 10:00 o'clock, and you are satisfied to have the defendant remain on the present bail?

Mr. Pike: That is correct, your Honor.

The Court: So the defendant is ordered to be in court at Carson City, Nevada, on Tuesday, November 7, 1951.

State of Nevada,
County of Clark—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby cer-

tify: That I was present and took verbatim short-hand notes of the proceedings had in the foregoing-entitled matter and that the foregoing pages, numbered 1 to 5, including this page, comprise a true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Las Vegas, Nevada, May 24, 1951.

/s/ **MARIE D. MCINTYRE,**
Official Reporter.

[Endorsed]: Filed May 24, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR CONTINUANCE

To: United States of America, Plaintiff, and to
Miles N. Pike, United States Attorney:

Please Take Notice that the undersigned counsel for the defendant will, on Thursday, the 15th day of November, 1951, at 10:00 o'clock a.m. at Carson City, Nevada, or at such other place as may be convenient to the Court, move the above-entitled Court for a continuance of the trial of the defendant, Elmer F. Remmer, until April 1, 1952. Said Motion will be based upon a supporting Affidavit to be presented on or before the date of the hearing hereof.

Dated: November 9, 1951.

LOHSE & FRY,
Of Counsel for the Defendant.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1951.

[Title of District Court and Cause.]

MOTION FOR CONTINUANCE

The defendant, through his counsel, respectfully moves the Court to grant a continuance of his trial until April 1, 1952, for the following reasons:

The defendant has not been given reasonable opportunity to prepare for trial.

(a) In that the Government has in its possession various records of business ventures in which defendant was a partner during the period covered by the indictment, and refuses to permit defendant to examine such records, except upon the condition, among others, that defendant submit the written consent of third parties who are unknown to the defendant and whose names the Government refuses to disclose to the defendant;

(b) In that the defendant has been unable to adequately prepare for trial by reason of the Government's refusal to release from a tax lien filed by the Government any portion of the defendant's assets, notwithstanding that defendant has offered to post a surety bond with a qualified company fully protecting the Government with respect to any funds released; and the Government has refused to release any of the defendant's assets except upon the conditions impossible for defendant to meet, as will be more particularly set forth in the Affidavit to be presented in support hereof.

(c) In that to properly prepare defendant's

case for trial requires a complete accounting analysis of all records relating to nine separate business ventures in which the defendant had an interest during the period covered by the indictment and the refusal on the part of the Government to release any portion of defendant's assets has greatly restricted his ability to employ and secure accounting assistance requisite for the proper preparation of his defense;

(d) In that the indictment contains no particulars enabling the defendant to determine upon what the indictment is based, despite defendant's Motion for a Bill of Particulars, which was denied.

That this Motion will be based upon an Affidavit of counsel to be presented on or before the date of the hearing hereof.

Dated: November 9, 1951.

LOHSE & FRY,
Of Counsel for Defendant.

[Endorsed]: Filed November 13, 1951.

[Title of District Court and Cause.]

**NOTICE OF MOTION TO INSPECT
AND TAKE COPIES**

To: United States of America, Plaintiff, and to
Miles N. Pike, United States Attorney:

Please Take Notice that the undersigned counsel

for the defendant will, on Thursday, the 15th day of November, 1951, at 10:00 o'clock a.m. at Carson City, Nevada, or at such other place as may be convenient to the Court, move the above-entitled Court for its order that the United States Attorney permit the defendant to inspect and copy or photograph the books, papers, documents and other tangible objects described in the motion hereto attached. Said motion will be based upon supporting affidavits to be presented on or before the date of the hearing hereof.

Dated the 12th day of November, 1951.

/s/ JOHN R. GOLDEN,
Attorney for Defendant.

ORDER SHORTENING TIME

On motion of defendant's counsel, cause appearing,

It Hereby Is Ordered that the foregoing notice of motion may be served by mail not later than November 13, 1951.

/s/ ROGER T. FOLEY,
Judge of the United States
District Court.

[Endorsed]: Filed November 14, 1951.

[Title of District Court and Cause.]

MOTION TO INSPECT AND TAKE COPIES

The defendant, through his counsel, respectfully moves the Court for its order that the United States Attorney permit the defendant to inspect and copy or photograph, at such times and places and in such manner and upon such terms and conditions as are just, the books, papers, documents and tangible objects hereinafter described, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon the ground that said items may be material to the preparation of his defense and that the request therefor is reasonable, all as more fully appears in the affidavits to be used at the hearing of this motion.

Said books, papers, documents and tangible objects are as follows:

The books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of, the following businesses for the years 1944, 1945 and 1946, from which businesses the United States contends the defendant received taxable income as an owner during said years: One Ten Eddy Street; B-R Smoke Shop; One Eighty-Six Club; Day-Nite Cigar Store; 21 Club; San Diego Social Club; 311 Club; Menlo Club, Menlo Bar and Tiny's Waffle Shop; Transit Smoke Shop and Transit Club; and any other businesses from

which the Government contends defendant received income as an owner during said years.

This motion will be made under Rule 16 of the Rules of Criminal Procedure based upon affidavits of counsel to be presented on or before the date of the hearing hereof.

Dated this 12th day of November, 1951.

/s/ JOHN R. GOLDEN,
Attorney for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed November 14, 1951.

[Title of District Court and Cause.]

**AFFIDAVIT OF JOHN R. GOLDEN IN
SUPPORT OF MOTION FOR CONTINU-
ANCE AND OF MOTION TO INSPECT
AND TAKE COPIES**

State of California,
City and County of San Francisco—ss.

John R. Golden, being duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice before the United States Court of Appeals for the Ninth Circuit, the United States District Court for the Northern District of California and all the Courts of California, and in the above-entitled case before the United States District Court for the District of Nevada; that he has been

the personal attorney for the defendant herein for approximately three and one-half years and knows of his own knowledge the matters hereinafter averred; that he has been one of the attorneys representing the defendant in income tax matters since February, 1950; that prior thereto the Bureau of Internal Revenue placed liens against the defendant in a total sum in excess of Eight Hundred Thousand (\$800,000.00) Dollars; that as a result of said liens the defendant ever since has been without funds or other assets with which to prepare and undertake his defense herein; that affiant has never received any fee or compensation for his representation of the defendant herein; that shortly after the defendant's income tax case came to affiant's attention, affiant attempted to obtain a release of a portion of the assets under lien in order to retain tax counsel and properly prepare and undertake representation of the defendant in his tax matters; in this connection affiant telephoned to the then Collector of Internal Revenue at Reno, Nevada, on June 20, 1950, and at said Collector's suggestion, wrote a letter to said Collector, with a copy to the United States Attorney at Reno, Nevada, on June 21, 1950, requesting permission to post a corporate surety bond to obtain a partial release of the assets under lien for the purposes aforesaid; that on the same day, June 21, 1950, said Collector wrote to affiant denying such permission; that affiant again wrote to said Collector on June 22, 1950, renewing said request, and on July 6, 1950, said Collector wrote to affiant to the effect

that he would not consider a bond for partial release but would accept corporate surety bond in the then amount of said liens, that is, Eight Hundred Sixty-Seven Thousand, Three Hundred Seventy-Three and 52/100 (\$867,373.52) Dollars; that the defendant could not possibly procure a bond in any such amount; that prior to June 20, 1950, affiant engaged the services of a certified public accountant practicing in San Francisco, California, to assist him in his representation of the defendant in income tax matters, in the expectation that a portion of the defendant's assets under lien would be released for the purposes aforesaid and that defendant would accordingly be able to compensate said accountant for his services; that after affiant's failure to obtain a release of a portion of the defendant's assets as aforesaid, said accountant notified affiant in November, 1950, that his services would not be available in connection with the defendant's income tax matter; that both affiant and his associate, Leslie C. Gillen, engage in general civil and criminal practice and neither of them is versed in income tax law and procedure; that after the office of the Regional Counsel, Penal Division, Bureau of Internal Revenue, had recommended indictment herein, affiant, through personal friendship, was able to associate Spurgeon Avakian, attorney at law of Oakland, California, who specializes in income tax law, as one of the defendant's counsel, and arrangements were made for a conference in defendant's case in Washington, D. C. with the

Department of Justice; that said conference was cancelled by the Department of Justice just prior to the departure of Mr. Avakian to Washington, D. C. to attend said conference; that on March 2, 1951, affiant wrote to Assistant Attorney General Theron Lamar Caudle, in charge of the tax division of the Department of Justice, Washington, D. C., renewing his efforts to obtain a release of a portion of the defendant's assets under lien and requesting that no action be taken on the recommendation for indictment until there had been such release of assets and an opportunity to prepare a showing against such indictment; that Mr. Caudle in reply notified affiant that such matters were the responsibility of the Bureau of Internal Revenue rather than the Department of Justice; that accordingly affiant wrote to Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C. on March 9, 1951, again renewing said request; that Mr. Oliphant agreed to discuss this matter when counsel arrived in Washington, D. C. for the forthcoming conference with the Department of Justice; that said conference was cancelled by the Department of Justice on March 14, 1951, and the Chief Counsel for the Bureau of Internal Revenue referred affiant to Walter Campbell, Regional Counsel, Penal Division, in San Francisco, California, in connection with his attempts to obtain a release of a portion of the defendant's assets under lien; that during the next two weeks counsel for the defendant and said Mr. Campbell held several discussions concerning this matter, and in said dis-

ussions Mr. Campbell informed counsel that on instructions from the Bureau of Internal Revenue, Washington, D. C., he would have to insist that as a condition of the release of any assets that the defendant submit a statement of his present assets and liabilities; notwithstanding the renewed offer to post a corporate surety bond in any reasonable amount to protect the Government in releasing any such assets; that such condition was not feasible because without the funds with which to retain an accountant the defendant could not furnish same and, accordingly, this last request for a release of a portion of the defendant's assets was, in effect, denied; that on April 9, 1951, the indictment herein was filed; that affiant, being still without the services of an accountant, filed a motion for a bill of particulars herein on approximately April 27, 1951; that counsel for the United States refused to supply affiant with any of the particulars so demanded and said motion was placed on the calendar for hearing on June 15, 1951, on which date the above-entitled Court denied said motion; that thereafter said Mr. Avakian conferred with affiant and advised him that, particularly by reason of the complete lack of any particulars as a result of the denial of the motion for a bill of particulars, it would be essential to the proper preparation and presentation of the defense herein that the services of an accountant be engaged and that such accountant have sufficient time and opportunity to analyze the books and other records pertaining to all the defendant's activities; that in September, 1951, although still

hampered by lack of funds for the defense herein, affiant, again through personal friendship, finally was able to engage the services of Lawrence Semenza, certified public accountant of Reno, Nevada, to assist in the preparation and presentation of the defense herein; that said Mr. Semenza commenced to work immediately in this case but has not completed his analyses nor had made available to him all of the books and other records that pertain to this case all as more fully appears in the affidavit of said Mr. Avakian filed herewith.

/s/ JOHN R. GOLDEN.

Subscribed and sworn to before me this 12th day of November, 1951.

[Seal] /s/ MARIE FORMAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed November 14, 1951.

[Title of District Court and Cause.]

**AFFIDAVIT OF SPURGEON AVAKIAN IN
SUPPORT OF MOTION FOR CONTINU-
ANCE AND OF MOTION TO INSPECT
AND TAKE COPIES**

State of California,
City and County of San Francisco—ss.

Spurgeon Avakian, being duly sworn, deposes and says:

I am an attorney at law, practicing in Oakland, California, as a member of the firm of Phillips & Avakian, and specializing in tax law.

In March, 1951, Mr. John R. Golden associated me as counsel for Mr. Elmer Remmer in connection with an investigation then being conducted by the Bureau of Internal Revenue of the tax returns of Mr. Remmer. Subsequently, on April 9, 1951, Mr. Remmer was indicted by the United States Grand Jury in Carson City, Nevada, for allegedly attempting to defeat and evade the income taxes of himself and his wife for the years 1944, 1945 and 1946. Said case is presently set for trial in Carson City on November 28, 1951, and this affidavit is being made for presentation to the Court in support of a motion by defendant for a postponement of said trial to permit defendant's counsel to prepare for trial and of a motion for inspection of records in possession of the Government. The following facts are within my own personal knowledge, except as indicated otherwise.

1. The Government's Refusal to Permit Inspection of Books and Records of Defendant's Businesses. On October 22, 1951, I talked by telephone with Mr. Walter M. Campbell, Jr., who is Regional Counsel of the Penal Division of the Bureau of Internal Revenue, in San Francisco, California, and who, I am informed, has been designated to try the above-entitled case for the Government. I told him that I had just learned that the Government had in its possession various books and records of

some of the business ventures in which Mr. Remmer had an interest, and that, in preparation for trial, I wanted to arrange for an examination of them. He stated that all such records were then in Reno undergoing examination by representatives of the Bureau, and that arrangements for our examination of them there could be made if we showed that Mr. Remmer had an interest in the businesses to which they pertained. I replied that, if the Government contended that Mr. Remmer had an interest in such businesses, that should be sufficient showing of his interest; but if Mr. Campbell would give me a list of the businesses as to which he had any doubt, I would endeavor to make such additional showing as might be necessary. Mr. Campbell said he would prefer to have me submit a list of the businesses in which Mr. Remmer claimed to have had an interest during the years in question. Since Mr. Campbell was then engaged in a trial which had been in progress for three weeks (and which was not concluded until November 7), he asked me to telephone this list to his secretary. I attempted to get in touch with Mr. Campbell's secretary later that day and also on October 23, but was unable to do so.

Accordingly, on October 23, 1951, I wrote to Mr. Campbell as follows:

“Dear Mr. Campbell:

“As stated in my telephone conversation with you yesterday, I have just learned that the Bureau has in its possession various records of some of the

ventures in which Mr. Remmer had an interest. We would like to arrange for the examination of such records in the immediate future, in preparation for the trial in the above-entitled case. In view of your statement that the records are now in Reno, I assume that the best procedure would be for Mr. Semenza to see them there as soon as you have given the necessary authority to your men in Reno.

"So far as I know, Mr. Remmer had an interest in the businesses known as One-Ten Eddy, B-R Smoke Shop, 186 Club, Day-Nite Cigar Store, 21 Club, San Diego Social Club, 311 Club, Menlo Club, and Transit Smoke Shop. If this list is incomplete, and the government has possession of the records of other businesses in which he had an interest, we would, of course, be entitled to study those records also and would appreciate being advised accordingly.

"Thanking you for your co-operation, I am,

"Sincerely yours,

"SPURGEON AVAKIAN."

Because Mr. Campbell was then engaged in said trial continuously I was unable to confer with him personally on this matter until November 9, 1951, except for one telephone conversation on or about October 30, 1951, in which he stated that, because of his preoccupation with said trial, he had not yet had a chance to consider my letter of October 23. On November 7 I received from him a letter dated

November 6, which, insofar as pertinent to this point, reads as follows:

“Dear Mr. Avakian:

“Reference is made to your letter dated October 23, 1951, concerning records of some of Elmer Remmer’s ventures, which records you believe are now in the possession of the Bureau of Internal Revenue. You wish to arrange to examine such records in preparation for the trial of the case.

“* * *

“* * * As Mr. Remmer’s representative, you are, of course, entitled to see any records of his which we may have, provided proper showing is made as to his interest; and inasmuch as such records were obtained from third parties, the written consent of such parties to inspection by Remmer or his representatives should be furnished this office.

(Emphasis added.)

“Very truly yours,

“WALTER M. CAMPBELL, JR.,
“Regional Counsel.”

On November 8, I discussed this letter with one of Mr. Campbell’s assistants, who suggested that I talk directly to Mr. Campbell. I was unable to contact Mr. Campbell until November 9, at which time I told him that I saw no basis for requiring the consent of third parties as a condition to our examination of the records of Mr. Remmer’s businesses, but, if he would give us the names of such

third parties, we would attempt to obtain their consent rather than delay further our preparation for trial. He replied that he did not feel free to give us such names.

Thereafter, on November 9, 1951, I wrote again to Mr. Campbell, renewing my request for permission to examine said records, objecting to the condition of furnishing the written consent of third parties, but offering to seek the consent of such parties if he would give me their names and addresses and describe the records as to which the consent of each of them was required.

During the period 1944-6, inclusive, Mr. Remmer reported on his Federal income tax returns income from the businesses known by the following trade names, as an owner of a partial interest therein: One Ten Eddy Street; B-R Smoke Shop; One Eighty-Six Club; Day-Nite Cigar Store; 21 Club; San Diego Social Club; 311 Club; Menlo Club, Menlo Bar and Tiny's Waffle Shop; Transit Smoke Shop and Transit Club.

Furthermore, in 1949, after the filing of tax liens against Mr. Remmer as more particularly described in the affidavit of John R. Golden, which is filed herewith, the Bureau of Internal Revenue issued its notice of assessment (commonly known as a 90-day letter), in which it alleged that Mr. Remmer received income from the businesses whose trade names are listed above, during the years 1944-6, inclusive. The interest of Mr. Remmer in the business ventures to which the books and rec-

ords in question relate is shown, therefore, not only in his tax returns but also in the adjustments proposed by the Bureau of Internal Revenue.

My experience as a tax attorney includes three years of service with the Tax Division of the Department of Justice, in Washington, D. C., and five years of private practice. Based on that experience, it is my opinion and belief that proper preparation of this case for trial requires an accounting analysis of all books and records of the business ventures in which Mr. Remmer had an ownership interest. Because of the Government's refusal to identify the third parties from whom these records were obtained, and because I have been unable to gain this knowledge in any other way, I do not know precisely what records the Government now has in its possession, but I believe that they include the books of account, ledgers, cash books and expense books of some or all of the businesses named above. All such records, together with any others pertaining to said businesses, are material to the preparation of Mr. Remmer's defense, since they constitute evidence tending to show the amount of net income of said businesses.

Based on my experience as a tax attorney, it would, in my opinion, probably require a minimum of one month, and more probably two or three months, to analyze the records of these nine businesses, once such records have been made available to defendant's representatives.

2. The Effect of The Denial of a Bill of Particulars. As shown in the accompanying affidavit

of Mr. John R. Golden, the defendant's motion for a Bill of Particulars was denied by the Court. The indictment simply alleges a total amount as the net income for each year, without any particulars. No further information has been obtained from the Government, contrary to its usual practice of advising a taxpayer of the items of income alleged to be unreported and of giving him a chance to submit evidence relative thereto, prior to an indictment. The 90-day letters issued by the Bureau of Internal Revenue in 1949 to Mr. Remmer and his wife provide no assistance to defendant in preparing for trial because they are based on amounts of alleged net income substantially different from those alleged in the indictment. The following tabulation shows the amounts of the combined net income of Mr. and Mrs. Remmer, as shown on their returns, as set forth in the 90-day letters issued in connection with the tax liens filed in 1949, and as alleged in the indictment:

Year	Per Returns	Per 90-Day Letters	Per Indictment
1944	\$ 19,000.00	\$136,718.94	\$ 67,469.21
1945	59,318.36	265,661.78	75,865.19
1946	22,494.58	185,150.63	188,471.68
<hr/>			
Total	\$100,812.94	\$587,531.35	\$331,806.08

The fact that so many different businesses are involved in this case, makes it necessary to do a tremendous amount of accounting work to prepare for trial. The denial of any particulars simply

magnifies this task, because proper preparation requires an analysis of each and every business, even though the Government may secretly intend to challenge the correctness of the tax returns only as to some of them in the trial of the case.

3. Other Factors Bearing on the Inability to Prepare a Defense by November 28, 1951. As set forth above, the analysis of defendant's records which are in possession of the Government will not be possible by November 28, even if the Government makes such records available on November 15. In my conversation with Mr. Campbell on October 22, 1951, the only condition he mentioned for examination of these records was the making of a satisfactory showing as to Mr. Remmer's interest. The further condition, that we furnish the written consent of undesignated third parties, was not mentioned prior to Mr. Campbell's letter of November 6. The raising of this second condition after a delay of more than two weeks from the making of our request, has delayed by that much time the preparation of the defense.

From the time when I was first associated in this case, I have advised Mr. Golden and the defendant that, particularly in view of the numerous business ventures involved, a tremendous amount of accounting work would be required, and that the case was too complex to analyze without such accounting. The efforts to obtain proper accounting assistance, and the effect on these efforts of the Government's refusal to release any of Mr. Remmer's assets from the tax liens mentioned above,

are related in the accompanying affidavit of John R. Golden. As soon as the services of an accountant were obtained, in September, 1951, said accountant commenced work on this case, under my general direction, and from then until October 19, 1951, he was diligently engaged in such preparation. I first learned, during conferences with said accountant in Reno on October 18 and 19, 1951, that the books and records of the businesses named above were in the possession of the Government. Promptly after my return to my office in Oakland, on October 22, 1951, I requested permission from Mr. Campbell to examine said records, with the results set forth above.

Within the limitations resulting from the Government's refusal to release any of Mr. Remmer's assets from the tax liens, defendant and his counsel have sought with diligence to prepare for trial but have been unable to do so for the reasons set forth above and in the accompanying affidavit of John R. Golden.

/s/ SPURGEON AVAKIAN.

Subscribed and sworn to before me this 12th day of November, 1951.

[Seal] /s/ MARIE FORMAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed November 14, 1951.

[Title of District Court and Cause.]

**AFFIDAVIT OF WALTER M. CAMPBELL,
JR., IN OPPOSITION TO MOTION FOR
CONTINUANCE AND TO MOTION TO
INSPECT AND TAKE COPIES**

District of Nevada—ss.

Walter M. Campbell, Jr., being duly sworn, deposes, and says:

That he is an attorney at law, presently serving as Regional Counsel, Penal Division, Bureau of Internal Revenue; that he is appearing in the above-entitled case by virtue of an appointment by the Attorney General of the United States as Special Assistant to the United States Attorney for the District of Nevada, which appointment has heretofore been filed with the Clerk of this Court, together with the requisite oath of office; that as a part of his duties as Regional Counsel he reviews reports of investigations made by various agencies of the Bureau of Internal Revenue regarding violations of the Internal Revenue laws for the purpose of determining whether or not the evidence justifies a recommendation by the Commissioner of Internal Revenue to the Attorney General that prosecution be had and, in the event the Attorney General forwards a particular case to the United States Attorney, he then provides such assistance as the United States Attorney may desire in the presentation of evidence to a Grand Jury and to the court if the need therefore arises; that the

United States Judicial District of Nevada is within the jurisdiction of affiant in the performance of his official duties; that it is the practice of the affiant during the consideration of a case to afford the taxpayer and his representatives conferences at which they may offer evidence or such explanations as they may desire for the purpose of convincing affiant or his representatives that prosecution should not be recommended; that the report and recommendation of the Intelligence Unit of the Bureau of Internal Revenue in the above-entitled case was received by affiant on or about January 11, 1950; that the indictment herein was returned on April 9, 1951, and the defendant was arraigned on April 10, 1951, and thereafter entered his plea of not guilty on April 27, 1951, at which time a date was set for trial on November 7, 1951, which has since been continued to November 28, 1951; that on June 15, 1951, a motion on behalf of the defendant for a bill of particulars was denied by this court;

That during the course of the pendency of this proceeding and from and after January 11, 1950, and continuing up to the present time, conferences and communications have been had with various attorneys and accountants representing the defendant Elmer F. Remmer; that under the rules of procedure of the Treasury Department it is required that before conferences can be held with the representatives of a taxpayer the taxpayer must file with the Treasury Department a power of attorney authorizing his representative to appear in

his behalf; that the following powers of attorney, the originals of which are in affiant's possession, have been filed by or on behalf of the taxpayer:

(1) Power of attorney executed April 29, 1949, by Elmer F. Remmer to Daniel J. Hanlon, Attorney at Law, Washington, D. C., and Paul Dillon, Attorney at Law, St. Louis, Missouri;

(2) Power of attorney executed June 2, 1949, by Elmer F. Remmer to John P. Thatcher, Attorney at Law, Reno, Nevada, and Lawrence J. Semenza, Certified Public Accountant, Reno, Nevada;

(3) Power of attorney executed March 10, 1950, by Elmer F. Remmer to John P. Thatcher, Attorney at Law, Reno, Nevada, William K. Woodburn, Attorney at Law, Reno, Nevada, Lawrence Semenza, Certified Public Accountant, Reno, Nevada, John R. Golden, Attorney at Law, San Francisco, California, Leslie C. Gillen, Attorney at Law, San Francisco, California, Nathan Jay Friedman, Certified Public Accountant, San Francisco, California, Paul Dillon, Attorney at Law, St. Louis, Missouri, and Daniel J. Hanlon, Attorney at Law, Washington, D. C.;

(4) Power of Attorney executed November 17, 1950, by Elmer F. Remmer revoking previous powers of attorney as to John P. Thatcher, Attorney at Law, Daniel J. Hanlon, Attorney at Law, and Nathan Jay Friedman, Certified Public Accountant, and appointing or reaffirming the appointment of the following: Andrew E. Hurley, Attorney at Law, New York, New York, William J. Forman,

Attorney at Law, Reno, Nevada, William K. Woodburn, Attorney at Law, Reno, Nevada, Lawrence Semenza, Certified Public Accountant, Reno, Nevada, John R. Golden, Attorney at Law, San Francisco, California, Leslie C. Gillen, Attorney at Law, San Francisco, California, and Paul Dillon, Attorney at Law, St. Louis, Missouri.

In addition to the above-named attorneys and certified public accountants there have also been associated in the case in behalf of the defendant Spurgeon Avakian, Attorney at Law, Oakland, California, since not later than April of 1950, and George Lohse, Attorney at Law, Reno, Nevada, within the past few days;

That, by reason of the foregoing, affiant believes and therefore states that the defendant Elmer F. Remmer has at all times, and particularly since April 29, 1949, been represented by competent legal counsel and by competent accountants; that Lawrence J. Semenza, a certified public accountant, has continually, since at least June 2, 1949, represented the defendant in this matter;

That a conference was held in affiant's office on May 25, 1950, at which were present on behalf of the defendant John R. Golden, Attorney at Law, and Nathan Jay Friedman, Certified Public Accountant; that it was represented to the affiant at that time that Mr. Friedman was at that time actively engaged in making an audit of the defendant's affairs; that affiant informed the taxpayer's representatives that if they prepared a net worth statement on behalf of the taxpayer that the

Government representatives would be willing to meet further with the taxpayer's representatives and make a comparison of such net worth statement with that which had been prepared on behalf of the Government; that no such net worth statement has ever been presented on behalf of the defendant;

That on October 30, 1950, a conference was held in affiant's office at which were present in behalf of the taxpayer John R. Golden, Attorney at Law, Andrew E. Hurley, Attorney at Law, and Nathan Jay Friedman, Certified Public Accountant; that during the course of this conference it was revealed on behalf of the taxpayer that an audit was being conducted and on that occasion certain records were made available to and turned over to the accountant for the taxpayer;

That at a time prior to the indictment in this case certain records which had come into the possession of the investigating agents from third parties were delivered to Lawrence Semenza, Certified Public Accountant, at his request and upon his receipt and promise to restore them when desired by the representatives of the Government, in order that the said Semenza might use them in connection with his employment by the defendant; that thereafter and in preparing to present this case to the Grand Jury at Carson City, Nevada, Mr. Semenza was called upon to return such records; that thereupon Mr. Semenza stated that he had turned such records over to Nathan Jay Friedman, Certified Public Accountant, who in turn had delivered them

to John R. Golden, Attorney at Law, and that the said attorney would not release the records to him in order that he might restore them to the Government as he had agreed; that thereafter a subpoena duces tecum was issued to the said Lawrence Semenza to appear before the Grand Jury and produce such records; that the said Lawrence Semenza appeared before the said Grand Jury without said records and repeated under oath substantially the same statement theretofore made to the investigating agents; to wit, that the attorneys for the defendant had refused to restore possession of said records; that on or about October 24, 1951, affiant received the original of the letter set forth upon Pages 2 and 3 of the affidavit of Spurgeon Avakian filed herein; that on November 6, 1951, affiant wrote Mr. Avakian, as follows:

“Dear Mr. Avakian:

“Reference is made to your letter dated October 23, 1951, concerning records of some of Elmer Remmer’s ventures, which records you believe are now in the possession of the Bureau of Internal Revenue. You wish to arrange to examine such records in preparation for the trial of the case.

“You are familiar with the circumstances under which Lawrence Semenza received some of the records in this case from Special Agent Ray A. Weaver, gave a receipt to him for them and agreed to return them to Mr. Weaver on notice. At that time Mr. Semenza had on file a power of attorney authorizing him to represent Remmer before the Bureau. At a later time return of the records was

sought from Semenza, who was unable to carry out his undertaking because he had turned them over to another accountant representing Remmer. It is our belief that counsel for taxpayer (of whom it is realized you are only one) had it in their power to enable Semenza to fulfill his undertaking, but declined or refused to do so.

"In the light of the foregoing, we do not feel justified in permitting any of the records involved in this case to leave our possession. As Mr. Remmer's representative, you are, of course, entitled to see any records of his which we may have, provided proper showing is made as to his interest; and inasmuch as such records were obtained from third parties, the written consent of such parties to inspection by Remmer or his representatives should be furnished this office."

That by reason of the foregoing affiant believes and therefore states the fact to be that the defendant has had ample opportunity to prepare the defense of his case and that the motions for a continuance and for inspection of records should be denied.

/s/ WALTER M. CAMPBELL, JR.

Subscribed and sworn to before me this 15th day
of November, 1951.

[Seal] AMOS P. DICKEY,

Clerk of the District Court.

By /s/ O. F. PRATT,
Deputy.

[Endorsed]: Filed November 15, 1951.

[Title of District Court and Cause.]

**COPY OF CRIMINAL DOCKET ENTRY
OF NOVEMBER 15, 1951**

Nov. 15, 1951. Hearing on Defendant's Motion for a continuance of trial date; and Motion to Inspect and Take Copies. Ordered that both Motions are denied.

[Title of District Court and Cause.]

**NOTICE OF MOTION FOR PRODUCTION
AND INSPECTION OF BOOKS, PAPERS,
DOCUMENTS AND OBJECTS**

To: United States of America, Plaintiff, and to Miles N. Pike, United States Attorney:

Please take notice that the undersigned counsel for the defendant will, on Tuesday, the 27th day of November, 1951, at 10:00 o'clock a.m. at its Courtroom at Carson City, Nevada, or at such other time as may be convenient to the Court, move the above-entitled Court for its order that the United States Attorney and his Special Assistant in the above-entitled case, be directed to produce the books, papers, documents and objects designated in the subpoena hereto attached, copies of which subpoena are being served on the United States Attorney and his Special Assistant herein, before the Court at a time prior to the trial of the above-entitled case

or prior to the time when the same are to be offered in evidence or at such other time as the Court may direct, and for its further order that upon the production thereof the defendant and his attorneys and accountant be permitted to inspect the same, at such times and places and in such manner and upon such terms and conditions as are just. Said motion will be based upon the affidavits referred to in the motion hereto attached.

Dated the 20th day of November, 1951.

/s/ JOHN R. GOLDEN,
Attorney for Defendant.

[Endorsed]: Filed November 23, 1951.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION AND INSPECTION OF BOOKS, PAPERS, DOCUMENTS AND OBJECTS

The defendant, through his counsel, respectfully moves the Court for its order that the United States Attorney and his Special Assistant in the above-entitled case, be directed to produce the books, papers, documents and objects designated in the subpoena hereto attached and hereinafter described, copies of which subpoena are being served on the United States Attorney and his Special Assistant herein, before the Court at a time prior to the trial of the above-entitled case or prior

to the time when the same are to be offered in evidence or at such other time as the Court may direct, and for its further order that upon the production thereof the defendant and his attorneys and accountant be permitted to inspect the same, at such times and places and in such manner and upon such terms and conditions as are just.

Said books, papers, documents and objects are as follows:

All books, papers, documents and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained from or belonging to the defendant or obtained from others by seizure or by process or obtained by Government counsel in any manner other than by seizure or by process, (a) in the course of the investigation by the Grand Jury which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to said Grand Jury, or (b) are to be offered as evidence in the trial of the defendant under said indictment, or (c) are admissible in evidence either for or against the defendant with respect to any of the allegations or charges contained in said indictment, including without limitation the books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of, the following busi-

nesses for the years 1944, 1945 and 1946, from which businesses the United States contends the defendant received taxable income as an owner during said years; One Ten Eddy Street; B-R Smoke Shop; One Eighty-Six Club; Day-Nite Cigar Store; 21-Club; San Diego Social Club; 311 Club; Menlo Club; Menlo Bar and Tiny's Waffle Shop; Transit Smoke Shop and Transit Club; and any other businesses from which the Government contends defendant received income as an owner during said years.

Said motion will be made under the authority of Rule 17 of the Rules of Criminal Procedure and the decision of the United States Supreme Court on April 30, 1951, in the case of Bowman Dairy Co. vs. United States, 341 U. S. 214-222, 95 L. ed. 879, 95 L. ed. Advance Opinions 545, and will be based upon the affidavits of Spurgeon Avakian and John R. Golden in support of Motion for Continuance and of Motion to Inspect and Take Copies, which affidavits were filed herein on approximately November 13, 1951, and further affidavits to be presented on or before the date of the hearing hereof.

/s/ JOHN R. GOLDEN,
Attorney for Defendant.

[Title of District Court and Cause.]

**SUBPOENA TO PRODUCE DOCUMENT
OR OBJECT**

To: Miles N Pike, United States Attorney, and to
Walter M. Campbell, Jr., Special Assistant.

You are hereby commanded to appear in the United States District Court for the District of Nevada at the Post Office Building in the city of Carson City on the 27th day of November, 1951, at 10:00 o'clock a.m. to testify in the case of United States v. Elmer F. Remmer and bring with you all books, papers, documents and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained from or belonging to the defendant or obtained from others by seizure or by process or obtained by Government counsel in any manner other than by seizure or by process, (a) in the course of the investigation by the Grand Jury which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to said Grand Jury, or (b) are to be offered as evidence in the trial of the defendant under said indictment, or (c) are admissible in evidence either for or against the defendant with respect to any of the allegations or charges con-

tained in said indictment, including without limitation the books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of, the following businesses for the years 1944, 1945 and 1946, from which businesses the United States contends the defendant received taxable income as an owner during said years: One Ten Eddy Street; B-R Smoke Shop; One Eighty-Six Club; Day-Nite Cigar Store; 21 Club; San Diego Social Club; 311 Club; Menlo Club, Menlo Bar and Tiny's Waffle Shop; Transit Smoke Shop and Transit Club; and any other businesses from which the government contends defendant received income as an owner during said years.

This subpoena is issued upon application of the defendant.

Dated: November 20, 1951.

[Seal] /s/ **AMOS P. DICKEY,**
Clerk.

By /s/ **MARION G. OSMAN,**
Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 23, 1951.

[Title of District Court and Cause.]

**AFFIDAVIT OF CHRISTOPHER P. MILLER
IN SUPPORT OF MOTION FOR PRO-
DUCTION AND INSPECTION OF
BOOKS, PAPERS, DOCUMENTS AND
OBJECTS**

**State of California,
City and County of San Francisco—ss.**

Christopher P. Miller, being duly sworn, deposes and says:

That I am a Certified Public Accountant registered in the State of California;

That in the spring of 1950 I was taken by Mr. Ray Weaver, a Special Agent of the Intelligence Unit of the Bureau of Internal Revenue, to a room located at 100 McAllister Street, San Francisco, California, and there shown material which was stated to be records obtained by the Bureau relating to Elmer Remmer; that this material consisted of a mass of original documents such as adding machine tapes, bank statements, cancelled checks, dealers' daily reports and daily information relating to a number of businesses in which Elmer Remmer was alleged to have an interest; that this material filled a packing box of approximately fifty cubic feet in volume plus several other smaller cartons;

That the total time that I and others with whom I am associated spent reviewing these records was not more than twelve hours of which my time was not more than eight hours;

That I estimated that the time necessary for a complete audit of these records would be in my opinion more than one month. Since I was informed that there were no funds available, neither I or my associates did any further work on these records;

That since November 15, 1950, neither I nor anyone else with whom I am associated have done any work on this case.

/s/ CHRISTOPHER P. MILLER.

Subscribed and sworn to before me this 24th day of November, 1951.

[Seal] /s/ WILLIAM H. BENDER,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires June 28, 1955.

[Endorsed]: Filed November 26, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF LESLIE C. GILLEN IN SUPPORT OF MOTION FOR PRODUCTION AND INSPECTION OF BOOKS, PAPERS, DOCUMENTS AND OBJECTS

State of California,
City and County of San Francisco—ss.

Leslie C. Gillen, being duly sworn, deposes and says:

That he is an attorney at law duly admitted to

practice before the United States Court of Appeals for the Ninth Circuit, the United States District Court for the Northern District of California and all the Courts of California, and in the above-entitled case before the United States District Court for the District of Nevada; that he has been one of the attorneys representing the defendant in income tax matters since approximately February or March, 1950, and knows of his own knowledge the matters hereinafter averred; that during the latter part of March, 1951, affiant's associate, John R. Golden, was on temporary active duty as a Reserve Officer with the United States Army, and during that time affiant was negotiating with Walter Campbell, Regional Counsel, Penal Division, Bureau of Internal Revenue, San Francisco, California, in an attempt to obtain the release of a portion of the defendant's assets under income tax lien upon the posting of a satisfactory corporate surety bond to protect the Government, and in the course of those negotiations affiant offered to submit for Mr. Campbell's consideration the defendant's affidavit reciting his inability to finance his defense, and confirmed such offer by letter to Mr. Campbell dated March 28, 1951, reading as follows:

"This refers to our conference this afternoon regarding a release of funds to Mr. Remmer for preparation of his defense to contemplated charges of tax evasion.

"We understand that the Chief Counsel of the Bureau has suggested that, as a condition of re-

leasing any funds from the government's lien, Remmer should submit a statement of assets and liabilities, and of the amounts needed. As we have pointed out to you, however, a financial statement cannot be prepared without extensive accounting work, and we cannot hire an accountant until after funds have been released.

"With regard to your inquiry as to whether Remmer can submit an itemized list of his assets and liabilities, without a valuation of the items which would require accounting analysis, we feel that there are certain basic objections as discussed below, and that a preferable procedure would be to release funds on a surety bond which would fully protect the government. The bond could be conditioned on the payment of the tax liability as ultimately determined and would obligate the surety company to pay the amount of the bond if the tax liability were not paid by Remmer. We believe that such a bond can be obtained from a reputable surety company, on the strength of collateral which would be provided by Remmer's brother.

"With such a bond, the government would, for all practical purposes, be protected as fully as it is now, and a release of funds on that basis would neither prejudice the government nor subject the Bureau to criticism.

"Our fear of having our client submit a list of assets and liabilities lies in the ever-present possibility that some assets might be omitted through faulty memory, especially in the absence of accounting analysis of his financial transactions during the

past few years. Mr. Remmer's activities have been varied, and have frequently involved loans and investments with personal friends and close business associates, without the record-keeping formalities which are observed in dealings between strangers. Under these circumstances, there would be a real possibility of unintended errors in any statement based solely on his memory.

"If this were an ordinary case, we could assume the risk of satisfying the government, in the event of such errors, that the taxpayer had simply made a mistake. This, however, is a case in which a certain newspaper has created a public atmosphere most unfriendly to the taxpayer. The denial to us of a conference on this matter in the Department of Justice in Washington is, we believe, one of the results of that newspaper campaign against our client. It is quite possible, therefore, that any mistakes made by our client in a list of assets, no matter how honest and unintentional, will subsequently be made the basis of a criminal accusation. The pressure on the government to do this might be particularly strong if Remmer should be indicted and thereafter should be acquitted of tax evasion charges.

"We want to make it clear that our objection to the submission of an itemized financial statement is based on (1) the danger of inadvertent errors, in the absence of accounting investigation, and (2) the fact that the government can be fully protected by a surety bond without the submission of an itemized financial statement. The making of such

errors is a matter of common human failing against which we, as counsel, have a duty to exercise caution, and it is solely in that spirit that we respectfully request that the funds be released on a surety bond basis.

"Our client would, of course, submit an affidavit reciting his inability to finance his defense and affirming that he has no interest in the collateral posted with the surety company.

"We understand that the cash covered by the tax lien is the sum of approximately \$35,000 which is held in an escrow in Reno. It is our opinion that the accounting and legal fees and expenses in this case, if a full investigation is made, will exceed that amount, particularly if a lengthy trial should develop. Accordingly, we request that the full amount of that escrow be released.

"We trust that, in fairness to the taxpayer, the Bureau will permit a release of his funds without imposing conditions which are unnecessary to protect the government."

That Mr. Campbell rejected said offer and advised affiant that release of funds would not be recommended unless the defendant submitted a "satisfactory" detailed statement of his assets and liabilities, together with a statement of "what funds are necessary for his defense by way of attorneys' fees, accounting fees, etc."; that for the reasons outlined in the letter quoted above and because of the liens theretofore placed upon the defendant's assets, as appears from the affidavit of John R. Golden on file herein, and the consequent inability

to analyze the charges which the Government might be contemplating against the defendant and to make a true estimate of the situation, the defendant was unable to comply with the conditions demanded by Mr. Campbell; that on November 9, 1951, Spurgeon Avakian, one of the defendant's counsel herein, wrote a six page letter to Mr. Campbell in reply to the letter dated November 6, 1951, written by Mr. Campbell to Mr. Avakian and quoted in Mr. Campbell's affidavit in opposition to Motion for Continuance and to Motion to Inspect and Take Copies, filed herein on November 15, 1951; that affiant read to the Court Mr. Avakian's said letter to Mr. Campbell at the hearing of the Motions for Continuance and to Inspect and Take Copies made before the Court on November 15, 1951, at Las Vegas, Nevada, and incorporates said letter herein as though again set out in full; that to the best of affiant's belief Mr. Campbell has not replied to Mr. Avakian's said letter.

/s/ LESLIE C. GILLEN.

Subscribed and sworn to before me this 23rd day of November, 1951.

/s/ WILLIAM H. BENDER,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires June 28, 1955.

[Endorsed]: Filed November 26, 1951.

[Title of District Court and Cause.]

**NOTICE OF MOTION TO QUASH SUBPOENA
DUCES TECUM**

To: Elmer F. Remmer, defendant above named, and to Messrs. John R. Golden, Leslie C. Gil- len, Spurgeon Avakian, George Lohse and Leslie M. Fry, his attorneys:

You and each of you will please take notice that the undersigned counsel for plaintiff will on Tues- day, the 27th of November, 1951, at 10:00 a.m., at the Courtroom of the above-entitled Court, in Car- son City, Nevada, or as soon thereafter as counsel may be heard, move the above-entitled Court for orders as follows:

(a) For an order quashing the subpoena duces tecum heretofore served upon Walter M. Camp- bell, Jr., Special Assistant to the United States Attorney for the District of Nevada, at San Fran- cisco, California, on or about November 20, 1951, and

(b) For an order quashing the subpoena duces tecum heretofore served upon Miles N. Pike, United States Attorney for the District of Nevada, at Reno, Nevada, on November 23, 1951; that said motion will be made and based upon the affidavits referred to in that certain "Motion to Quash Sub-

poenae Duces Tecum" attached to this Notice of Motion.

Dated November 26, 1951.

/s/ MILES N. PIKE,
United States Attorney, One of the Attorneys for
Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed November 27, 1951.

[Title of District Court and Cause.]

**MOTION TO QUASH SUBPOENAE
DUCES TECUM**

The plaintiff, through its undersigned counsel, respectfully moves the Court for an order

(1) To quash the subpoenae duces tecum to produce "all books, papers, documents and objects * * *" heretofore caused to be served by counsel for the above-named defendant upon (a) Walter M. Campbell, Jr., Special Assistant to the United States Attorney for the District of Nevada, and (b) upon Miles N. Pike, United States Attorney for the District of Nevada, which said subpoenae were served respectively upon the said Walter M. Campbell, Jr., in San Francisco, California, on or about November 20, 1951, and upon said Miles N. Pike on November 23, 1951. That said motion to quash is made and based upon the following grounds and reasons:

(1) That compliance with said subpoenae duces tecum would be (a) unreasonable, and (b) oppressive.

(2) That the said records enumerated and designated in each of the two said subpoenae referred to records that have heretofore been made available for the inspection of the defendant or his duly authorized representatives on occasions long prior to the scheduled date of the above-entitled case upon the merits, which scheduled trial date is presently set for trial with a jury at Carson City, Nevada, at 10:00 a.m., Wednesday, November 28, 1951.

(3) That the said books, papers, documents and other records referred to in said subpoenae appear to be the same, or substantially the same, as the books, papers, documents and other records heretofore referred to by counsel for defendant in those certain Motions for Continuance and to Inspect and Take Copies and the evidence introduced and proceedings had with reference to said motions before the Federal Court sitting at Las Vegas, Nevada, on November 15, 1951, at the conclusion of which said hearing on said motions the said Court entered its order denying said motions and each of them.

That this motion is made pursuant to the authority contained in Rule 17c, Federal Rules of Criminal Procedure, and will be based upon the affidavit of Walter M. Campbell, Jr., heretofore filed in opposition to the above-referred-to Mo-

tions for Continuance and Motion to Inspect and Take Copies, both of which said motions were heard and determined by the above-entitled Court on November 15, 1951, in the above-entitled case, and which said affidavit of said Walter M. Campbell, Jr., was sworn to and filed in said case on or about November 15, 1951, and such further affidavits or testimony as may be filed or given prior to or at the hearing on this motion to quash said subpoena duces tecum and each of them.

Dated at Reno, Nevada, this 26th day of November, 1951.

/s/ MILES N. PIKE,
United States Attorney, One of the Attorneys for Plaintiff.

[Endorsed]: Filed November 27, 1951.

[Title of District Court and Cause.]

**COPY OF CRIMINAL ENTRY OF
NOVEMBER 27, 1951**

Nov. 27, 1951. Hearing on deft's Motion for Production and Inspection of Books, Papers, etc., and plff's Motion to Quash Subpoena Duces Tecum.

Nov. 27, 1951. Ordered deft's Motion for Production and Inspection, etc., is denied.

Nov. 27, 1951. Ordered Plff's Motion to Quash Subpoena Duces Tecum is granted.

Nov. 27, 1951. Ordered telegraphic request of Walter M. Campbell, Jr., for a postponement of trial is denied.

[Title of District Court and Cause.]

**AFFIDAVIT SUPPLYING OMISSIONS
IN THE RECORD**

State of Nevada,
County of Washoe—ss.

John R. Golden and Spurgeon Avakian, each being duly sworn, each for himself and not one for the other, deposes and says:

That he is one of the attorneys of record for defendant herein and was personally present in Court on December 19, 1951, during all of the proceedings hereinafter described and knows, of his own knowledge, the facts hereinafter averred.

That on said date, in the absence of the jury, affiant, John R. Golden, requested the Court to set a date and time for the hearing of defendant's Motion to Correct Errors in the Record arising from Omissions, which Motion was filed herein on December 17, 1951, and noticed for hearing on December 18, 1951, at 1:00 o'clock p.m., or at such other time as the Court may order.

That the Court informed said affiant that said Motion would be heard at the next calling of the Court's regular Motion calendar.

That said affiant thereupon requested the Court to hear said Motion not later than the last Court day of the year 1951.

That the Court denied said request.

That upon reading the transcript of the proceedings of December 19, 1951, in the absence of the jury, it appears that the Court Reporter did

not report the foregoing request by said affiant and the Court's foregoing statements, and the Court Reporter has so informed said affiant.

That each of said affiants has been informed that the next regular Motion calendar of the Court ordinarily would be held on January 7, 1952, but does not know whether said Motion will be heard then because the above-entitled case still is on trial, and will be on trial, on said day.

/s/ JOHN R. GOLDEN,

/s/ SPURGEON AVAKIAN.

Subscribed and Sworn to before me this 2nd day of January, 1952.

[Seal] /s/ DOROTHY MOHR,
Notary Public in and for the County of Washoe,
State of Nevada.

[Endorsed]: Filed January 2, 1952.

[Title of District Court and Cause.]

COPY OF CRIMINAL DOCKET ENTRY OF
FEBRUARY 21, 1952

Feb. 21, 1952. Hearing on deft's Motion to correct
errors arising from omissions. Ordered that this Motion is denied.

DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED BY THE COURT

Defendant's Requested Instruction No. 19

It is a maxim of our law that where an act may be attributed to a criminal or to a non-criminal cause, it is the duty of the jury to attribute the act to the non-criminal cause rather than the criminal one. A crime is never presumed where the conditions may be explained upon an innocent hypothesis.

The jury is instructed that it is their duty to reconcile all circumstances shown in evidence with the innocence of the defendant, and to account for all facts, if possible, upon the hypothesis that the defendant is not guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 10

You are instructed that you are not permitted to guess as to the guilt or innocence of the defendant. If the evidence is such that you are required to guess or indulge in surmise or conjecture as to the guilt or innocence of the defendant, then you must return a verdict finding the defendant not guilty. In such instance, the presumption of the defendant's innocence applies and your ver-

dict must be in accord with the presumption of innocence.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 16

I instruct you that it is a rule of law that a party is bound by the testimony of his own witness. This means that a party eliciting a fact from a witness called by him endorses and vouches for the credibility of and is concluded by the statements of such witness. This is true unless the party calling the witness has succeeded in impeaching him by certain well defined methods. These methods do not include a showing or allegation of bias or hostility.

Therefore, even if you may feel that a witness called by one of the parties is or might be biased or hostile to that party, nevertheless in determining the credibility of that witness you must follow the rule that the party calling him vouches for him and is bound by his testimony.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 17

You are instructed that the defendant in this case is presumed to have good character for the

traits involved in the accusation, and it is your duty to consider this presumption, together with all the other facts in the case, in arriving at your verdict.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 21

You must bear in mind that the character of evidence which would warrant a verdict in a civil case is different from that which is required by law to justify a conviction in a criminal case. A mere preponderance of evidence would be sufficient to justify a verdict against the defendant in a civil case, but it is wholly insufficient in a criminal case. In a criminal case, such as this, in addition to a preponderance of evidence the law requires that the evidence shall be of such character and be so clear and convincing that the jury, and each of the jurors composing the jury, shall be satisfied to a moral certainty and beyond all reasonable doubt that the defendant has committed the particular crime charged, before the jury can find the defendant guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 26

I instruct you that you are not entitled to consider or weigh, as against the defendant, the fact of his arrest upon the charge preferred here. Under no circumstances known to the law could you be justified in finding this defendant guilty, because of the fact of his arrest upon this charge; nor would you be justified in concluding that this defendant must be guilty or otherwise he would not have been arrested upon the charge preferred. I instruct you that in passing upon the merits of this case, you must remember that the guilt or innocence of a person accused of crime is not to be determined by the mere fact of his arrest, nor must you be influenced thereby.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 28

It sometimes happens that a case on trial attracts more than passing attention and notice, in the newspapers and among the public generally. However conscientious and careful a juror might be in observing the Court's admonitions and in keeping his or her mind insulated against any outside comment or observation, it might be that inadvertently and without any intention of influencing a juror, and without fault on anybody's part, some casual remark or chance observation, or comment might reach a juror's ear, particularly if a

case is talked about or commented upon generally in public places where a juror has to go, or is a matter or topic of general conversation.

It also happens sometimes that as testimony is given there are reactions or responses to it among those in attendance in the courtroom, whether the spectators have any direct interest in the outcome of the case or not. You are therefore instructed and admonished that if any incidents of this nature have occurred, or do occur, or if you are conscious of any such things, none of them should be permitted to influence or affect any of you to the slightest extent, bearing in mind always that it was to try this case on its merits that you were empanelled and sworn, and that the only evidence you may legally or properly consider or entertain under your oaths as jurors is such evidence produced by either side, in open Court, while the Court is in session, with both sides present and having the opportunity to cross-examine and otherwise to subject the evidence to the tests sanctioned by law.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 39

You are instructed that the evidence adduced by the prosecution is to be estimated not only by its intrinsic weight, but also according to the evidence which is in the power of the prosecution to pro-

duce. This rule in criminal cases applies solely to the prosecution and not to the defendant.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 40

You cannot convict the defendant upon your own or any suspicion, no matter how strong. In all criminal cases, the proof inculpating the accused should be of a degree of certainty transcending mere probability, mere surmises, speculations and conjectures, and exceeding strong suspicion.

The evidence in a criminal case may (let it be assumed), create a strong suspicion, or it may create a strong probability that the complicity of the defendant in the alleged crime is established as charged; but, nevertheless, I instruct you that our law, in its wise and humane demand for the protection of the life and liberty of a human being, requires more than strong suspicion or strong probability; it demands that the evidence should lead to a moral certainty of the conclusion of guilt, beyond every other reasonable hypothesis, and to the exclusion of all reasonable doubt. Less than this will not suffice; for if a defendant could be convicted on mere suspicion no citizen would be safe against public disgrace and imprisonment.

You are therefore charged by me that you would not be justified in finding this defendant guilty upon the ground that it is more probable that he

is guilty, if there be any such ground, than that he is innocent.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 41

You are instructed that suspicious circumstances are not, in themselves, sufficient to convict the defendant, but the prosecution must prove to a moral certainty and beyond a reasonable doubt the guilt of the defendant. If, after considering all the evidence in the case, you find that there are no more than suspicions, even though strong suspicions, as to the guilt of the defendant or that the evidence only creates suspicious circumstances pointing to the defendant, you must return a verdict finding the defendant not guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 42

You are instructed that laws are made and juries called upon to investigate cases just as much for the protection of the innocent as for the punishment of the guilty. If, therefore, after a careful consideration of all the evidence, you are not satisfied beyond a reasonable doubt that the defendant is guilty, you must say so by a verdict of "not

guilty." By so doing, the object of the law will be attained as fully as if you were to find a verdict of guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 43

The Court instructs the jury that matters of fact, if any, which are left uncertain by the evidence, cannot be made certain to the prejudice of the defendant by inference. In the absence of evidence, no inference can be drawn by the jury against the defendant; but, on the contrary all the inferences and presumptions consistent with the facts proved are to be drawn and indulged in favor of the innocence of the defendant. No fact or circumstances upon which you may base a conclusion of guilt is sufficient, unless such fact or circumstance has been proved beyond a reasonable doubt and to the same extent as if the whole conclusion depended upon that one fact or circumstance.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 47

You are instructed that if the testimony in this case in its weight and effect be such that two conclusions can be reasonably drawn from it, the one

favoring defendant's innocence because of lack of proof and the other tending to establish his guilt, the law demands that the jury shall adopt the conclusions favoring the defendant's innocence, because of said lack of proof, and therefore find the defendant "not guilty."

In other words, if the evidence in this case, in its weight and effect, be such that two conclusions can be reasonably drawn from it, the one tending to establish his guilt, and the other creating a reasonable doubt as to his guilt, law, justice and humanity alike demand that the jury shall adopt the conclusion of innocence and find the defendant "not guilty."

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 48

If one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and therefore if in such a case you have any reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would be thereby created, and you should give the defendant the benefit of the doubt, and acquit him.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 49

I instruct you that no defendant can be convicted unless the prosecution proves each and every fact necessary to constitute the crime to a moral certainty and beyond all reasonable doubt. A defendant cannot be convicted upon mere suspicion or upon probability of guilt, however strong. Neither can he be convicted upon a bare preponderance or upon a greater weight of the evidence, but only upon evidence that proves his guilt to a moral certainty and beyond all reasonable doubt. If there is any reasonable doubt of his guilt whatever, it will be your duty to find the defendant Not Guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 50

A defendant in a criminal case is never required or expected to prove his innocence, but the law places the burden on the prosecution to prove the defendant guilty of the crime with which he is charged, and to prove every fact essential to constitute that crime beyond all reasonable doubt and to a moral certainty; and if the jury cannot say, after a careful consideration of all of the evidence in this case, that the guilt of the defendant is thereby established in their minds beyond all reasonable doubt, and to a moral certainty, it is

their sworn duty to acquit the defendant by returning a verdict of "Not Guilty."

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 54

The Court instructs the jury that no facts or circumstance can be used by you as a basis for any inference of guilt against a defendant, unless such fact or circumstance is proved beyond every reasonable doubt, and every fact or circumstance in the case which is not proved beyond every reasonable doubt, should be wholly dismissed from your consideration, and must not be permitted by you to influence you to any extent against the defendant.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 56

You are instructed that under the law there are only two possible verdicts in a criminal case, namely, guilty and not guilty.

The verdict of guilty may be reached by you only if you and each of you are convinced that the defendant has been proved guilty to a moral certainty and beyond all reasonable doubt; if you are not absolutely so convinced your verdict must be not guilty.

In other words, you need not be satisfied of the defendant's innocence to reach a verdict of not guilty, but rather your verdict must be not guilty except in the one instance I have described.

The prosecution legitimately may ask for a verdict of guilty only if it has convinced you of the defendant's guilt to a moral certainty and beyond all reasonable doubt, but the defense is entitled to a verdict of not guilty under all circumstances save that of proof of guilt to a moral certainty and beyond all reasonable doubt.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 57

The reasonable doubt to which I refer, such as would entitle the defendant to an acquittal, need not necessarily arise out of or from the evidence itself, but may result or arise from a want or lack of evidence, sufficient to satisfy the mind.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 60

In a criminal trial you, the jury, cannot convict the defendant merely because you believe the evidence is such that a man of prudence would act upon it in his own affairs of grave importance. Men frequently act in their grave and important concerns

without a firm conviction that the conclusions upon which they proceed to act are correct, but having deliberately weighed all the facts and circumstances, known to them, they form a conclusion or opinion upon which they proceed to act, although they may not be fully convinced of its correctness. But such a degree of certainty is wholly insufficient to authorize a verdict of guilty in a criminal case. In criminal cases the jury should be fully convinced of the correctness of their conclusion, that the accused is guilty, and that conviction should be so clear and so strong as to exclude from their minds all reasonable doubt.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 69

One of the elements of the crime charged in this indictment is the making of a wilful attempt to evade the taxes. A wilful attempt must be shown by evidence of affirmative action on the part of the defendant, done with the motive of defrauding the government of income taxes. Acts of omission, such as the failure to make careful inquiries or to search for additional information which might show the correct tax, do not constitute a wilful attempt within the meaning of the statute of which the indictment is based. Before you may find the defendant guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant affirmatively, and by acts

of commission, did certain things with the bad purpose and the evil motive of deliberately showing an amount of tax on the returns of himself and his wife which he at the time knew to be less than the tax actually due.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 75

You are instructed that when considering Section 145b, I.R.C., the law speaks of "willfull" acts. This means acts of the type which by common knowledge are done to conceal. Where in filing an income tax return or avoiding payment of income taxes, full disclosure of the facts are made, fraud is negated by such disclosure, even if the taxpayer makes an erroneous or untenable claim based on such facts; revealment is deemed to exonerate such person from a charge of fraud.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 77

You are instructed that if you find from the evidence that the defendant acted without corrupt intent in doing the acts detailed by the evidence introduced upon the trial herein, such lack of cor-

rupt intent will entitle the defendant to an acquittal at your hands.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 78

You are instructed that if a defendant believed or understood the law to be different, or if he honestly sought and followed erroneous advice, or if he came to a belief that he was entitled to do that which he did do, such a defendant is entitled to be acquitted on any charge growing out of his acts based on such belief.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 79

I charge you that there are certain types of crime which are complete when the person intentionally does the acts denounced by law. There is another class of crime which requires not only the deliberate act but a further element, to wit: The commission of the act with a specific intent. The first intent, that is, general intent, is merely to do the act; the second class is to do the act with a specific intent that this act may bring about a certain result.

The specific intent involved in this indictment is an intent to defraud the United States of taxes.

This intent is a question of fact which must be proven by the prosecution beyond a reasonable doubt. After considering all the evidence, including the presumption of honest and lawful intent with which every defendant is clothed, should you entertain a reasonable doubt as to the intent of the defendant to defraud the United States of taxes you must acquit.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 80

Before the defendant in this case can be found guilty of the alleged charge set forth in the indictment, it must be established, by the evidence, to a moral certainty and beyond a reasonable doubt that the defendant had the specific intent to commit the acts therein alleged.

If, in your judgment as jurors, the prosecution fails to prove such specific intent to a moral certainty and beyond a reasonable doubt as to the defendant in this case, or, if after considering all the evidence you or any of you entertain a reasonable doubt as to whether the defendant in this case had such specific intent, then you must return a verdict finding the defendant not guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 81

Before you may convict the defendant you must be satisfied to a moral certainty and beyond every reasonable doubt that there is a tax deficiency due and that defendant wilfully and unlawfully paid less tax than he knew to be legally due.

Unless there is some form of deceit or dishonesty proved to you to a moral certainty and beyond every reasonable doubt, you must find the defendant not guilty.

The mere failure, if you find such failure existed, to pay the tax legally due, or the filing of an incorrect or false tax return, if you find such was done, is not enough to convict the defendant, but in addition you must also find to a moral certainty and beyond every reasonable doubt that any such act or omission was done purposely in bad faith with an intent to evade tax.

In other words, the gist of the offense is an act done with a bad purpose without justifiable excuse, and an honest rather than a dishonest error, due perhaps to honest reliance on the misguided advice of others or the incompetence of bookkeepers and accountants or an honest but mistaken interpretation of the applicable law or regulations, would not support a finding of wilfullness as the word is used in criminal law.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 82

You are instructed that error as to doubtful legal points, if honestly made, will not sustain a charge of fraud.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 88

In determining the good faith of the defendant you are to take into consideration all of the facts and circumstances disclosed by the evidence, including any information or legal advice you find that the defendant received in good faith and regardless of whether you find that such information or advice was true or proper.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 89

You are instructed that if you find from the evidence that the defendant exercised good faith in doing the acts detailed by the evidence introduced upon the trial herein, then such good faith will entitle such defendant to an acquittal at your hands, for it is the law that good faith is a complete defense to the charge alleged in the indictment herein.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 90

If you believe that the defendant sought advice with respect to tax liability on certain items and believed in and followed the advice, then even if the advice proved to be wrong, the defendant is entitled to an acquittal because the element of wilfulness would be absent.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 107

Before you may consider any evidence of any assets belonging to the defendant in computing his net worth, you must first find to a moral certainty and beyond all reasonable doubt that such assets were acquired and paid for by the defendant in the applicable year and you must also find to a moral certainty and beyond all reasonable doubt the cost to the defendant of such assets.

Withdrawn by counsel at time of settling instructions, February 15, 1952, to be subject of argument.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 108

In this case the government has attempted to prove that the defendant and his wife owe additional income tax for each of the years in question

by reference to what is known as the "net worth and expenditures" method. This method involves, for each year, the calculation of the increase in net worth from the beginning to the end of the year, and the addition to that increase of amounts spent by the defendant and his wife in the way of expenditures which are not deductible for income tax purposes. In order for this method to be effective, the net worth of the defendant and his wife at the beginning and the end of the year must be clearly and accurately established by competent evidence. Before you can treat this total amount—that is, the increase in net worth and the non-deductible expenditures—as taxable income for that year, you must be satisfied beyond a reasonable doubt that all of that money represents taxable income received by the defendant and his wife during that particular year. It is not up to the defendant to prove that some of that money was accumulated in prior years or was received by him or his wife in some form other than income, such as loans or gifts or inheritance. Rather, the government must prove beyond a reasonable doubt that its computations are based on income of each of the years 1944, 1945 and 1946. To meet this burden, the government must accurately establish the net worth of defendant and his wife at the beginning and end of each year. It is not sufficient for the government to list simply the assets and liabilities it knows about; it must also satisfy you, by competent proof, that there were no other assets and liabilities in existence. The defendant is not required to show that the gov-

ernment's net worth statements are incorrect or incomplete. If the government's proof leaves an uncertainty as to whether all the assets and liabilities of defendant are included in the government's computation of net worth, it follows that those computations cannot be relied upon.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 109

In this case the government has attempted to prove that the defendant and his wife owe additional income tax for each of the years in question by reference to what is known as the "net worth and expenditures" method. This method involves, for each year, the calculation of the increase in net worth from the beginning to the end of the year, and the addition to that increase of amounts spent by the defendant and his wife in the way of expenditures which are not deductible for income tax purposes. In order for this method to be effective, the net worth of the defendant and his wife at the beginning and the end of the year must be clearly and accurately established by competent evidence. Before you can treat this total amount—that is, the increase in net worth and the non-deductible expenditures—as taxable income for that year, you must be satisfied beyond a reasonable doubt that all of that money represents taxable income received by the defendant and his wife during that particular

year. It is not up to the defendant to prove that some of that money was accumulated in prior years or was received by him or his wife in some form other than taxable income, such as loans or gifts or inheritance. Rather, the government must prove beyond a reasonable doubt that its computations are based on taxable income of each of the years 1944, 1945 and 1946.

To meet this burden, the government must accurately establish the net worth of defendant and his wife at the beginning and end of each year. It is not sufficient for the government to list simply the assets and liabilities it knows about; it must also satisfy you, by competent proof, that there were no other assets and liabilities in existence. The defendant is not required to show that the government's net worth statements are incorrect or incomplete. If the government's proof leave any doubt based upon reason as to whether all the assets and liabilities of defendant are included in the government's computation of net worth, it follows that those computations cannot be relied upon, and you must find the defendant not guilty.

For example, if you are satisfied beyond a reasonable doubt that his net worth at the beginning of a particular year was \$100,000.00, and that his net worth at the end of that particular year was \$120,000.00; and if you are satisfied beyond a reasonable doubt that his non-deductible expenditures during that year were \$10,000.00; and if you are satisfied beyond a reasonable doubt that none of the \$20,000.00 increase in his net worth or of the \$10,000.00

in non-deductible expenditures came to defendant as a loan, or as a repayment of a prior loan, or as a gift or inheritance, you would then be justified in concluding that his net income for that year was \$30,000.00.

If, however, you cannot determine beyond a reasonable doubt the amount of his net worth at the beginning or end of the year, you cannot compute his net income by this method. As an illustration, if the defendant had an asset at the beginning of the year consisting of cash money in an undetermined amount, so that you could not compute his total net worth at the start of the year beyond a reasonable doubt, you could not determine how much his net worth actually increased during the year. On the other hand, if you should be satisfied beyond a reasonable doubt as to the amount of any such cash, you could compute the net income by this method.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 111

There has been evidence in this case that, in a number of businesses, the defendant entered into agreements with other parties providing that such other parties were to have a "working interest" in the business, consisting of a specified percentage of the profits, but were to leave their shares in the business until the defendant had recovered his in-

vestment, at which time the other partners would become partners in the assets of the business as well as in the profits.

Under the law it is permissible for two or more people to enter into such a partnership arrangement. If such an agreement is made, each partner is taxable on his percentage interest in the profits, regardless of how much money he actually draws out of the business. If one partner has originally contributed more of the investment than the other partners, and he draws more than his share of the profits out of the business, the excess simply reduces his investment in the business and is not taxable income. He is taxable only on his percentage share of the profits each year.

Accordingly, unless you are satisfied beyond a reasonable doubt that the defendant and his associates did not intend to operate said businesses as profit-sharing partners, you must treat the income of said businesses as partnership income and compute the defendant's tax only on his percentage share of the profits for each year.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 114

The crucial factor in applying the increase in net worth concept to prove income, is satisfactory proof of the taxpayer's assets at the starting point. In criminal cases the courts insist upon inflexible proof

that all of the taxpayer's assets have been accounted for at the start of the tax period in question.

In attempting to prove income for the years in question by the net increase in worth and expenditure method, it is incumbent upon the prosecution expressly to exclude the hypothesis that some of the large expenditures by the defendant, if you find evidence of any such expenditures, might have been made from sources other than current business income.

Without adequate proof that all of the defendant's assets at the beginning of the period were taken into consideration and his net worth at that time clearly and accurately established by competent evidence, and without excluding the reasonable probability that any increase in net worth or expenditures are traceable to prior accumulations or gifts or loans or other non-taxable items, the defendant must be acquitted.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 124

During the period involved in this indictment, Sec. 29.41-3 of Regulations III issued by the Secretary of the Treasury provided, in part, as follows:

"It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his

judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so. * * * Among the essentials are the following:

“(1) In all cases in which the production, purchase, or sale of merchandise of any kind is an income-producing factor, inventories of the merchandise on hand (including finished goods, work in process, raw materials, and supplies) should be taken at the beginning and end of the year and used in computing the net income of the year. * * *

“(2) Expenditures made during the year should be properly classified as between capital and expense; that is to say, expenditures for items of plant, equipment, etc., which have a useful life extending substantially beyond the year should be charged to a capital account and not to an expense account; and

“(3) In any case in which the cost of capital assets is being recovered through deductions for wear and tear, depletion, or obsolescence, any expenditure (other than ordinary repairs) made to restore the property or prolong its useful life should be added to the property account or charged against the appropriate reserve and not to current expenses. * * *”

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,

United States District Judge.

Defendant's Requested Instruction No. 129

There has been testimony in this case that the prosecution has in its possession various business records of the enterprises in which the defendant had an interest, and that the prosecution has not produced those records for introduction in evidence.

It would be proper for you to infer, from the prosecution's failure to produce those records, that they contain evidence which would be detrimental to the prosecution's case and beneficial to the defendant.

Furthermore, in determining whether these business enterprises maintained adequate books and records, it is proper for you to consider that, in addition to the books and records in evidence, there are other records maintained by these businesses which the prosecution has kept in its possession and has declined to place in evidence.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed March 10, 1952.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled case, find the defendant, Elmer F. Remmer, is guilty as charged in the first count of the indictment; is guilty as charged in the second count; is guilty as charged in the third count; is guilty as charged in the fourth count; 7 to 5 (Disagreement) guilty as charged in the fifth count; and 7 to 5 (Disagreement) guilty as charged in the sixth count.

Dated this 22nd day of February, 1952.

/s/ IRVIN J. SMITH,
Foreman.

Counts Nos. 5 and 6:

7 Guilty.
5 Not Guilty.

[Endorsed]: Filed February 22, 1952.

District Court of the United States for the
District of Nevada Division

No. 12,177

UNITED STATES OF AMERICA,

vs.

ELMER F. REMMER.

JUDGMENT AND COMMITMENT

Violation of Sec. 145(b), Internal Revenue Code;
26 U.S.C. Sec. 145(b), in 6 counts

On this 29th day of February, 1952, came the attorney for the government and the defendant appeared in person and by counsel, namely, John R. Golden, Esq., Leslie C. Gillen, Esq., and George Lohse, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not guilty, and a verdict of guilty of the offense. Count 1: That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America, for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of as

charged in counts 1, 2, 3, and 4 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted in counts 1, 2, 3 and 4.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 1: Five (5) Years and pay to the United States Government a fine in the sum of Five Thousand (\$5,000.00) Dollars. Count 2: Five (5) Years and pay to the United States Government a fine in the sum of Five Thousand (\$5,000.00) Dollars, the imprisonment portion of the sentence is to run concurrently with the imprisonment portion of the sentence imposed upon Count 1. Count 3: Five (5) Years and pay to the United States Government a fine in the sum of Five Thousand (\$5,000.00) Dollars, the imprisonment portion of the sentence is to run concurrently with the imprisonment portion of the sentence imposed upon Count 1. Count 4: Five (5) Years and pay to the United States Government a fine in the sum of Five Thousand (\$5,000.00) Dollars, the imprisonment portion of the sentence is to run concurrently with the imprisonment portion of the sentence imposed upon Count 1, so that the total sentence is Five (5) Years imprisonment, and the total amount of the fines is the sum of Twenty Thousand (\$20,000.00) Dollars. It Is Further Ordered that defend-

ant be further imprisoned until payment of the fines, or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

ROGER T. FOLEY,
United States District Judge.

The Court recommends commitment to: A Federal Penitentiary.

AMOS P. DICKEY,
Clerk.

By /s/ CHARLES V. MILLER,
Deputy Clerk.

A True Copy. Certified this 29th day of February, 1952.

[Seal] AMOS P. DICKEY,
Clerk.

By /s/ CHARLES V. MILLER,
Deputy Clerk.

[Title of District Court and Cause.]

SENTENCE

Be It Remembered, That the above-entitled matter came on for hearing before the Court at Carson City, Nevada, on Friday, February 29, 1952, Hon. Roger T. Foley, Judge, presiding, the plaintiff being represented by Messrs. Bruce Thompson and Robert F. McDonald, and the defendant being present in court with his attorneys, Messrs. Leslie Gillen, John R. Golden and George Lohse. The following proceedings were had:

The Court: In the case of the United States of America vs. Elmer F. Remmer, the record will show the presence of the defendant with counsel. The time fixed for consideration of the probation officer's report and time of sentence was originally fixed at three o'clock, but I am informed that counsel desire to have the matter heard at this time.

Mr. Gillen: We understood that you had finished the matter you had today and we wanted your Honor to know that we are here.

The Court: Will counsel stipulate we may proceed at this time?

Mr. Gillen: Yes, your Honor.

Mr. Thompson: Yes, your Honor.

Mr. Gillen: May it please the Court, there was filed this day by the defense a formal motion for a new trial. Your Honor will recall that on the occasion of the return of the verdict in this case, I orally advised your Honor of the intention of a

motion for a new trial and said it would be supplemented by a formal motion and your Honor permitted the motion to be filed as of this date. There are eighteen grounds specified in our motion, copy of which has been served on the United States attorney, and there is in support of that motion an affidavit made severally in joint form by Mr. Golden and myself. I might state, too, your Honor has possibly ruled on every ground that is set forth here, with the exception of ground 17, and I do not know what is your Honor's pleasure in regard to hearing any argument on the other 17 grounds set forth.

The Court: You have no desire to argue the matter further?

Mr. Gillen: We can.

The Court: If you want to.

Mr. Gillen: Well, if your Honor feels that argument would not in any wise change your Honor's decision regarding our position regarding the other 17 grounds, why, we submit the matter with the supporting affidavit.

The Court: Very well.

Mr. Gillen: And as to the 17th ground set forth, your Honor will note that this is a matter that came to our attention subsequent to the return of the verdict in this case and in that matter we ask for an opportunity to obtain evidence in that connection by hearing.

The Court: You submit the motion for a new trial now, the entire motion?

Mr. Gillen: Yes, we will submit that, with our request that—

The Court (Interceding): The motion for new trial will be denied on all the grounds stated therein.

Mr. Gillen: I take it that also includes, your Honor, that the defendant have a right to have a hearing on the 17th ground, take testimony on the 17th ground?

The Court: That will be also denied.

Mr. Gillen: Very well. It will appear that the next order would be the matters that are before you on the calendar for consideration.

The Court: Yes. The defendant may rise. Mr. Remmer, this is the time appointed for consideration of the probation officer's report and the matter of sentence. On the 22nd day of February, 1952, the jury impanelled in the case of United States of America vs. Elmer F. Remmer, No. 12,177, returned to this Court its verdict of guilty on the charge contained in the first count of the indictment, verdict of guilty on the charge contained in the second count of the indictment, and verdict of guilty on the charge contained in the third count of the indictment and verdict of guilty as charged in the fourth count of the indictment. Now, by virtue of the verdict of the jury, the defendant, Elmer F. Remmer, is hereby adjudged guilty of the offense set forth in the first count of the indictment, which charged that he did, on or about the 13th day of April, 1945, in the District of Nevada, wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing at the time to the

United States of America for the year 1944, by filing and causing to be filed with the Collector of Internal Revenue, a false and fraudulent income tax return, wherein he stated his net income for that year was \$9500 and that the amount of tax due and owing thereon was the sum of \$2570, whereas he then and there well knew his net income for the calendar year, computed on the community property basis, was the sum of \$33,734.61, and upon which a net income tax was due and owing in the sum of \$16,259.54. The defendant is adjudged guilty of that offense.

And by virtue of the verdict of the jury, the defendant is adjudged guilty of the charge set forth in Count 2 of the indictment, substantially the same as the charge contained in Count 1 of the indictment, except that it charges that the defendant did attempt to defeat and avoid a large part of the income tax due the government by his wife, Helen L. Remmer, by causing to be filed with the Collector of Internal Revenue a false and fraudulent income tax return, showing the same amount of net income as alleged in Count 1 of the indictment and the same amount of taxes due, and alleging also there was due the United States of America the sum of \$16,259.54. The defendant is adjudged guilty of that offense.

By virtue of the verdict of the jury, the defendant is adjudged guilty of the offense set forth in Count 3 of the indictment, which alleges that he did, on or about June 14, 1946, in the District of Nevada, wilfully and knowingly attempt to defeat and evade

a large part of the income tax due and owing the United States of America, by filing and causing to be filed with the Collector of Internal Revenue a false and fraudulent income tax return, wherein he stated his net income for the calendar year was \$28,888.68, computed on the community property basis, and that the amount of tax due and owing was the sum of \$13,072.02, whereas, as he then and there well knew that his net income for the said calendar year, computed on the community property basis, was the sum of \$37,157.10, upon which income he owed to the United States of America the sum of \$18,586.83. The defendant is adjudged guilty of the offense set forth in Count 3 of the indictment.

By virtue of the verdict of the jury, the defendant is adjudged guilty of the offense set forth in Count 4 of the indictment, which alleges that on or about the 14th of June, 1946, in the District of Nevada, the defendant, Elmer F. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by his wife, Helen L. Remmer, by filing and causing to be filed with the Collector of Internal Revenue in the District of Nevada, a false income tax return for and on behalf of Helen L. Remmer, in which it was stated her net income for the calendar year, computed on the community property basis, was the sum of \$30,429.68 and that the amount of taxes due and owing thereon was the sum of \$14,074.29, whereas, as he then and there well knew, her net income for said calendar year, computed on the

community property basis, was the sum of \$38,708.09, upon which said net income there was due and owing to the United States of America a tax of \$19,649.82. The defendant is adjudged guilty of that offense.

Now, Mr. Remmer, have you anything to say why the judgment of the Court should not be pronounced against you on Count 1 of the indictment?

A. No, sir.

The Court: Have you anything to say why the judgment of the Court should not be pronounced against you on Count 2 of the indictment?

A. No, sir.

Mr. Gillen: Your Honor, at this time I think we should properly have advanced our motion for a new trial, but your Honor has passed on it.

The Court: Have you anything to say why the judgment of the Court should not be pronounced against you on Count 3 of the indictment?

A. No, sir.

The Court: Have you anything to say, Mr. Remmer, why the judgment of the Court should not be pronounced against you on Count 4 of the indictment?

Mr. Gillen: Same answer.

The Court: I will be glad to hear from counsel or the defendant or both, but I think it might be well to hear from the probation officer and the United States Attorney. You may be seated. I did not require the probation officer to file a formal written report, for the reason I think the Court

has had ample opportunity to become acquainted with the facts and circumstances of this case during the trial. I did ascertain from the probation officer that the defendant, Elmer F. Remmer, has not until this time been convicted of a felony. Is there anything the United States Attorney would like to say?

Mr. Thompson: Your Honor please, I believe the ten or eleven weeks of trial also fairly informed all of us regarding Mr. Remmer's past activities and I see no need to make any additional statement.

The Court: Mr. Gillen, or other counsel, or the defendant, have you anything you would like to say further at this time?

Mr. Gillen: I think it would add nothing. Your Honor is acquainted with the fact there is no past criminal record or felony of this man and your Honor is acquainted with the fact of his business activities in the State of Nevada in connection with Cal-Neva and other matters that came before your Honor. I feel we don't have anything further at this time.

The Court: The Court having asked the defendant if he has anything to say why the judgment of the Court should not be pronounced against him on the four counts in the indictment, and no sufficient cause to the contrary been shown or appearing to the Court, it is the order of the judge that the defendant be, and hereby is, committed to the custody of the Attorney General, or his authorized representative, for imprisonment for the period of five years, and pay to the United States Government a fine in the sum of five thousand dollars on the

charge contained in Count 1 of the indictment. I want to say at this time I do not intend to impose any additional term, that the additional terms here will be concurrent, so the defendant will know now.

It is adjudged the defendant be, and hereby is, committed to the custody of the Attorney General or his authorized representative, for imprisonment for the period of five years and pay to the government of the United States five thousand dollars on the charge contained in Count 2 of the indictment. The term of imprisonment hereby imposed as punishment for the offense charged in Count 2 of the indictment, is to run currently with that imposed as punishment for the offense charged in Count 1 of the indictment.

It is adjudged the defendant be, and hereby is, committed to the custody of the Attorney General or his authorized representative, for imprisonment for the period of five years and pay to the Government of the United States five thousand dollars on the charge contained in Count 3 of the indictment. The term of imprisonment hereby imposed as punishment for the offense charged in Count 3 of the indictment is to run concurrently with that imposed on Count 1 of the indictment.

It is adjudged the defendant be, and hereby is, committed to the custody of the Attorney General, or his authorized representative, for imprisonment for the period of five years and pay to the Government of the United States five thousand dollars on the charge contained in Count 4 of the indictment. The term of imprisonment hereby imposed as pun-

ishment for the offense charged in Count 4 of the indictment is to run concurrently with that imposed on Count 1 of the indictment.

It is further ordered that said defendant be further imprisoned until the amount of the fine on each of said counts be paid to the United States Government, the total sum being twenty thousand dollars.

The defendant is committed to the custody of the United States Marshal for the execution and carrying out of the aforesaid judgment of the Court.

Mr. Gillen: Now, may it please the Court, at this time it is perfectly plain to me—I am sure I am correct in it—the term of imprisonment on each count is concurrent?

The Court: Yes.

Mr. Gillen: The fines imposed on each count are cumulative, twenty thousand dollars?

The Court: Yes, twenty thousand dollars total fine and total period of imprisonment five years, five years on each count and the second, third and fourth counts concurrent with Count 1.

It is recommended that this period of confinement be had in a federal penitentiary.

Mr. Gillen: I understand. At this time, may it please the Court, I respectfully appeal to the Court, advising the Court that it is the intention of the defendant to formally give notice of an appeal from the conviction in this matter. I appeal to the Court at this time to fix a bail and permit the defendant to be admitted to bail pending his bail under Rule 46(a), subdivision 2, of the Rules of Criminal Procedure. I understand it is only necessary for us to

make an oral motion, but we have made a written motion, which we present to your Honor and which we have served upon the United States attorney. I need not point out to your Honor that throughout this entire proceeding the defendant in this case has religiously appeared at each and every proceeding of the case and there was never any question about his appearance or about his tardiness in attendance upon court procedure, and I will ask your Honor to fix a bail at this time. We will file at the same time this formal notice of appeal—there are some insertions to be made—and we will file that, too.

The Court: That motion for bail is denied and defendant is remanded to the custody of the marshal. The court will be in recess until 10:00 o'clock Monday morning.

Mr. Gillen: May we interrupt, your Honor, upon another matter. There is another matter here that we want to take up with your Honor. Rule 38(a), subdivisions 2 and 3, provide an election that reposes in a convicted person under sentence to elect not to commence the service of his sentence and to also stay the payment of any fines pending a review of his case by an appellate tribunal, and at this time there is before your Honor, presented by the defendant, a formal election upon the part of the defendant, on the basis of the appeal to be taken, not to commence the serving of his sentence and to stay the payment of the money sentence until the entire matter has been reviewed. That, your Honor will find in Rule 38A, sections 2 and 3.

The Court: Of course, do you contemplate giving some security for the fine?

Mr. Gillen: I suppose it could be arranged. Of course, your Honor does have in mind that there is a very substantial lien which now has tied up all of the available property of the defendant, all of his assets.

The Court: I have no objection, and I can not see why there should be any objection, to an order staying the sentence of imprisonment pending the appeal, that is as to the effect of staying the operation of the sentence, but I would require ample security for the payment of the fine on that condition.

Mr. Gillen: Not in derogation of your Honor's thought, I wonder how the United States attorney feels about that, because they are familiar with the substantial lien on our defendant's assets, more than enough to protect—

The Court: Has the United States any objection to an order staying sentence pending appeal?

Mr. Thompson: I think the defendant has the right not to elect commencing upon service of his sentence. Mr. Gillen attributes to our office a considerable sum we have a lien. It is true that the federal government has attempted to place a lien upon the defendant's property. Whether that has actually been effected against all or any substantial part of the defendant's property, we have no knowledge. As a matter of fact, I do not know personally just what particular items of property are presently subject to the lien thereon.

Mr. Gillen: There is one item of 35-thousand dollars in cash, lien at the First National Bank of Nevada, and your Honor will recall there was some evidence here—

The Court (Interceding): I will make the order that the fines may be stayed upon the defendant giving good and sufficient bond in the sum of twenty thousand dollars.

Mr. Gillen: May we have a certain number of days in which to put up that bond? In other words, the election to stay the beginning of the prison sentence has the effect of not releasing the defendant, but keeping him in custody locally. Now, we wouldn't want to see him whisked away before we could put that bond up.

The Court: He won't be whisked away.

Mr. Golden: Your Honor's order was he be imprisoned until the fine is paid. May that be made that we have five days in which to post that bond and pending that he will remain here and then that condition will be met by posting of the security. Do I make that clear, your Honor?

Mr. Gillen: The arrangements have to be made with some surety company and this is Friday afternoon. We are also facing a two-day holiday in which we can't do anything.

The Court: He has been committed to the custody of the marshal and I can't see where he will suffer any additional inconvenience by requiring the bond to be presented—

Mr. Gillen: What Mr. Golden is thinking of, while he is exercising his election as to the impris-

onment portion of the sentence, he apparently is under compulsion to pay the money fine of the sentence—

The Court: That will be stayed as soon as the bond is presented. What rule is that?

Mr. Golden: 38(a), 3.

The Court: I have made an order that payment of the fine will be stayed upon condition that a bond in the sum of twenty thousand dollars be filed and I don't understand just what difference it would make—

Mr. Gillen: And he should be imprisoned until payment of that fine. The United States marshal may determine, since your Honor said imprisonment should be in a federal penitentiary, that as to that part—

The Court: He shall be imprisoned on this fine part by the United States marshal until the bond is filed and approved by the United States attorney.

Mr. Gillen: All right. We just were fearful—

The Court: So you understand that. So we will be in recess until Monday morning at 10:00 o'clock.

State of Nevada,
County of Clark—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, in the matter of the sentence

held in Carson City, Nevada, on February 29, 1952, and that the foregoing pages, numbered 1 to 15, inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Las Vegas, Nevada, March 31, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause.]

**COPY OF CRIMINAL DOCKET ENTRY
OF FEBRUARY 22, 1952**

Feb. 22, 1952. Mr. Gillen gives oral notice of motion for new trial. Ordered deft's time is extended to Feb. 29, 1952, to file written Motion for New Trial.

Feb. 22, 1952. Mr. Gillen moves for order releasing deft. on bail. Ordered that this motion is denied, and deft. is remanded to the custody of the Marshal.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for each of the following reasons:

1. The Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the evidence.
2. The Court erred in overruling defendant's objections to and denying defendant's motions to strike:
 - a. The testimony of the witness Scollin and Government Exhibits 17, 18 and 19 and each of them.
 - b. The testimony of the witness Badobinatz and Government Exhibit 42.
 - c. Government Exhibits 15 and 60 and each of them.
 - d. The testimony of the witness Lando as to his lack of acquaintanceship with certain named persons, viz.: Joe Leonard, Bob Burgess, Sacramento Sam and Crying Mack.
 - e. The testimony of the witness Gillingham and Government Exhibit 58.
 - f. The testimony of the witness McCaffery and Government Exhibit 59.
 - g. The testimony of the witness Greenhouse and Government Exhibit 71.
 - h. The testimony of the witness Strong and Government Exhibits 100 and 100a and each of them.

- i. The testimony of the witness Bray and Government Exhibit 101.
- j. The testimony of the witness Hill and Government Exhibit 16.
- k. The testimony of the witness Ezralow as to Government's Exhibits for Identification 154, 154a and 154b and each of them.
- l. The testimony of the witnesses Kyne, Maundrell, Casselini, Busterna, Lando, Silverman and Ezralow and each of them as to the 186 Club and Government's Exhibits 87, 87a, 88, 88a, 166, 167, 43, 131 and 110f and each of them.
- 3. The verdict is contrary to the weight of the evidence, especially as to the recognition of the partnerships and of the loans.
- 4. The verdict is not supported by substantial evidence, especially as to the use of the net worth and expenditures method to compute net income.
- 5. The Court erred on June 15, 1951, in denying defendant's motion for a bill of particulars.
- 6. The Court erred on November 15, 1951, in denying defendant's motion to inspect and take copies.
- 7. The Court erred on November 27, 1951, in denying defendant's motion for production and inspection of books, papers, documents and objects and in quashing the subpoena duces tecum issued in connection therewith.
- 8. The Court erred in compelling defendant's counsel, during the trial, to produce defendant's

books and records and in denying defendant's motions to return them and suppress their use in evidence and in admitting them in evidence over defendant's objections.

9. The Court erred in denying defendant's motions, during the trial, for the production and inspection and admission in evidence of defendant's books and records taken and retained by the Government and withheld from evidence.

10. The Court erred in sustaining objections to questions addressed to the witnesses Kyne, Maundrell, Schriber, Weaver, Brady, Morgan and Harkness and each of them for the Government, and the witnesses Semenza, Woodburn, Thatcher, Graham, Edna Jeffress, James Jeffress and Golden and each of them for the defense, and in rejecting defendant's offers of proof in connection with said defense witnesses and said Brady.

11. The Court erred in refusing to allow in evidence Defendant's Exhibits Z, D1, E1 and F1 and each of them.

12. The Court erred in admitting testimony of the witness Weaver, especially as to an alleged conversation with the defendant.

13. The Court erred in charging the jury and in refusing to charge the jury as requested.

14. The Court erred in denying the defendant's motions for a mistrial.

15. The Court erred in permitting the attorney

for the Government over objection to argue to the jury outside the record.

16. The Court erred in denying defendant's challenge for cause to the prospective juror John W. Humphrey.

17. The defendant was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the jury, the Court, the prosecuting attorneys and the Agents of the Federal Bureau of Investigation and each of them in the circumstances described in the affidavit filed herewith, which by this reference is incorporated herein. The interests of justice demand and the defendant respectfully moves that there be a trial of this issue, that he be permitted to adduce evidence as such trial, that subpoenas be issued for the attendance at such trial as witnesses of the jurors, the trial Judge, the members of the United States Attorney's office and other prosecuting counsel, the Agents of the Federal Bureau of Investigation, the person who communicated with the juror I. J. Smith and others who participated in the incident described in said affidavit, and that defendant through his counsel be permitted to examine fully into the conversation and what took place between such unidentified person and the juror Smith, the conversation and what took place between the juror Smith and the trial Judge, the conversation and what took place between the juror Smith and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge

and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the prosecuting attorneys or any of them and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, the conversations and what took place, pertaining to this incident, between the juror Smith and the other jurors or any of them, the conversation and what took place between the unidentified person who spoke to the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, and generally into all matters and things pertaining to the incident described in said affidavit in order to fully investigate the same to determine to what extent it had any effect on the jury and was prejudicial to the defendant.

18. The defendant was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the trial Judge.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,

By /s/ JOHN R. GOLDEN,
Attorneys for Defendant.

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

**AFFIDAVIT IN SUPPORT OF MOTION
FOR NEW TRIAL**

State of California,
City and County of San Francisco—ss.

Leslie C. Gillen and John R. Golden, being duly sworn, each for himself and not one for the other, deposes and says:

That he is one of the defendant's attorneys in the above-entitled case and participated in the trial thereof.

That the trial of said case commenced on November 28, 1951; that the jury reached its verdicts on February 22, 1952; that subsequently and on February 23, 1952, affiant first learned of the facts hereinafter averred.

That in December, 1951, or January, 1952, a person unknown to affiant had a conversation with one of the jurors in said case, namely, I. J. Smith, who later became the foreman of the jury; that in the course of said conversation said person made a remark to said Smith to the effect that said Smith could profit by bringing in a verdict favorable to the defendant; that said Smith promptly reported the substance of said conversation to the trial Judge in said case, Honorable Roger T. Foley, and the latter conferred with the prosecuting attorneys concerning same; that as a result the Federal Bureau of Investigation was requested to and did make an investigation of said incident and made a report

thereon; that neither Judge Foley nor the prosecuting attorneys related said incident to any of defendant's counsel and the latter were kept in complete ignorance thereof until the verdicts had been reached, and thereafter learned thereof only through the press; that copies of articles appearing, respectively, in the San Francisco Chronicle and the Oakland Tribune, on Sunday, February 24, 1952, are attached hereto and by this reference incorporated herein.

That, had defendant's counsel been apprized of the situation, they would have moved for a mistrial and further would have requested that Judge Foley remove said Smith as a juror and substitute an alternate juror, or which there were two, for him, for the reason that said Smith, having had such conversation, quite naturally would be apprehensive of being suspected and criticized were he to vote and attempt to have the other jurors vote for a verdict in favor of the defendant, and thus would be and was prejudiced against the defendant by reason of such conversation; that the omission of the trial Judge to bring the facts of the aforesaid out-of-Court incident to the attention of defense counsel at the time of its occurrence prevented defense counsel from making timely efforts to avoid prejudice to the defendant as aforesaid and his acts and conduct deprived defendant of a fair trial.

That the interests of justice demand and affiant respectfully moves that there be a trial of this issue, that he be permitted to adduce evidence at such trial, that subpoenas be issued for the attend-

ance at such trial as witnesses of the jurors, the trial Judge, the members of the United States Attorney's office and other prosecuting counsel, the Agents of the Federal Bureau of Investigation, the person who communicated with the juror I. J. Smith and others who participated in the incident described hereinabove, and that defendant through his counsel be permitted to examine fully into the conversation and what took place between such unidentified person and the juror Smith, the conversation and what took place between the juror Smith and the trial Judge, the conversation and what took place between the juror Smith and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the prosecuting attorneys or any of them and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, the conversations and what took place, pertaining to this incident, between the juror Smith and the other jurors or any of them, the conversation and what took place between the unidentified person who spoke to the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, and generally into all matters and things pertaining to the incident

described hereinabove in order to fully investigate the same to determine to what extent it had any effect on the jury and was prejudicial to the defendant.

/s/ LESLIE C. GILLEN,

/s/ JOHN R. GOLDEN.

Subscribed and sworn to before me this 28th day of February, 1952.

[Seal] /s/ WILLIAM H. BENDER,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires June 28, 1955.

Remmer Jury
Cleared in
Hint of 'Fix'

Judge Reveals FBI Made
Probe After Report of
Remark to One of Panel

By Victor Stier
Tribune Staff Writer

Carson City, Nev., Feb. 23.—Federal Judge Roger T. Foley revealed today that the FBI investigated the possibility of jury tampering midway in the income tax evasion trial of Elmer F. (Bones) Remmer.

The FBI found no evidence of tampering in its inquiry, Judge Foley said.

Remmer, Bay area and Nevada gambler, was found guilty by a jury last night of four of the six counts of tax evasion on which he was indicted in 1948. He is now in the Washoe County Jail at Reno awaiting sentencing, which has been set for 3 p.m. next Friday.

From his jail cell today, Remmer declared: "We're going to fight this thing through. We've just started. If I had it to do all over, I'd do it the same way with the same lawyers."

Remark by Juror

Judge Foley said the tampering investigation stemmed from a remark made to one of the jurors, I. J. Smith, a Reno insurance and realty man, who subsequently became jury foreman.

Sometime in December, the judge related, Smith came to him and told this story:

A former client of his (Smith's) had come to his home on business. During the course of their conversation, he made a remark to the effect that Smith could get a lot of money out of the trial through the defense.

Smith told the judge he thought the man, a dealer in a Reno gambling casino, had simply made a waggish remark and that he was kidding. However, in view of Judge Foley's admonitions not to discuss the case, Smith said he decided to report the incident.

Asks FBI Check

Judge Foley said today that he informed the prosecution, but not the defense, and had the Reno office of the FBI check the story.

"It was the conviction of the FBI, and my own that the man made a remark in bad taste."

Asked why he didn't tell the defense, Judge Foley explained: "If there was anything to the report, it probably would have been a defense move. If it had been a police officer or an internal revenue man who had made the remark, I would have notified the defense and not the prosecution, so as to eliminate any possibility of their stopping the investigation."

Attorneys Aroused

Defense attorneys were irate when informed of Judge Foley's story.

"Any conference with the judge should have had both sides present," they declared in a statement.

"If we had been informed, as we had a right to be, we would have strongly urged Judge Foley to excuse the juror and replace him with one of two alternates since it would have been only natural for that juror to lean over backwards to avoid any possible criticism or suspicion.

"If the judge gave the report enough weight to refer it to the FBI, it is all the more reason why we should not have been kept in ignorance."

Denies Tampering

Smith denied the report, but admitted: "I did talk to Judge Foley about another thing. Nobody tried to influence me. The man might have been out of line, but he did not try to tamper with me."

Asst. U. S. Attorney Bruce Thompson said: "I can't talk about it."

Remmer was dressed in a light tan, monogrammed

sport shirt and tan checked slacks when he talked with newsmen in the Reno jail today.

His declaration to "fight this thing through" backed up statements made last night by his attorneys, who said they will file formal motions of appeal and for a new trial early this week.

Reno Gambler Talked With Juror

Jury Tampering Charge Enters the Remmer Case

By Pierre Salinger
Chronicle Staff Writer

Carson City, Nevada, Feb. 23.—Elmer F. (Bones) Remmer's attorneys are going to bring up the matter of a "secret investigation" of alleged tampering, when the San Francisco gambler's conviction for tax evasion goes to the Federal Circuit Court in San Francisco on appeal.

The announcement was made today after Federal Judge Roger T. Foley confirmed that he had summoned the FBI to check into a visit a gambling house dealer paid to one of the jurors hearing the case.

The Judge said he had informed the prosecution about the incident, but had not mentioned anything about it to the defense.

As Attorneys Leslie C. Gillen and John R. Golden began preparing the way for an appeal, their client spent his first day in the Washoe County Jail. He was sent to jail Friday after the jury convicted him on four counts of criminally evading his income

taxes in the years 1944 and 1945. The jury could not agree on two other counts involving Remmer's taxes in 1946.

Gambler's Visit

The gambling house dealer's conversation with a juror took place in December, when the trial was less than a month old. He called on I. J. Smith, a Reno real estate dealer and insurance man, a member of the jury and later its foreman, to consult with him about some automobile insurance.

Picture on Page 3

In the course of the conversation the dealer said: "You could get a pile if you would go along with Bones."

Smith, who confirmed the incident, said he considered the remark only a jest, but he reported it the following day to Judge Foley.

The Judge, who said he also did not take the remark seriously, called in the FBI because, he said, "a Judge should take every precaution." The FBI's report confirmed his belief that the remark was not meant seriously, the Judge added.

Defense Objections

Asked why he had notified the Government's attorneys about the "innocent incident," but not the defense, Judge Foley explained:

"This incident turned out to be harmless. But if there had been anything to it, and if we had told the defense, it would have stifled our investigation."

Gillen and Golden objected to this comment.

"Any conference with the Judge should have had both sides present," they said, in a joint statement. "By definition, all parties are present at a conference.

"If we had been informed, as we had the right to be, we would have strongly urged Judge Foley to excuse the juror and replace him with one of the two alternates. Under the circumstances, it would have been the natural thing for that juror to lean over backward to avoid any possible criticism or suspicion.

"Judge Foley gave the incident enough credence to refer it to the FBI. That is all the more reason why he should not have kept us in ignorance."

First Night in Jail

The attorneys reported today that, in spite of the secrecy, they had finally learned of the incident.

Remmer, meanwhile, reported he was well rested after spending the night in jail for the first time in his life.

When he arrived at the jail in Reno after his conviction last night, he made up for the lack of a pillow in his cell by curling up his clothes and resting his head on them. Then he dropped off to sleep almost instantly.

He chatted briefly with his lawyers and newsmen.

"If we had it all to do over again, I'd do it with the same lawyers and the same way," Remmer said.

And, to the newsmen who interviewed him

through the bars of his little cell, the portly gambler commented:

"I still don't know what I'm here for. I don't know of a single thing I've done to be in here."

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

**COPY OF CRIMINAL DOCKET ENTRY
OF FEBRUARY 29, 1952**

Feb. 29, 1952. Ordered that the motion for new trial is denied.

Feb. 29, 1952. Judgment order. Entg. Judgment. Judgment: Ordered deft. be committed to the custody of the Attorney General for 5 years on each of counts 1, 2, 3 and 4, the sentences on counts 2, 3 and 4 to run concurrently with the sentence imposed upon count 1; and fined \$5,000.00 on each of counts 1, 2, 3 and 4, so that the total sentence is 5 years and fined \$20,000.00. The Court recommends commitment to a Fed. Pen. Remanded.

[Title of District Court and Cause.]

**ELECTION NOT TO COMMENCE SERVICE
OF SENTENCE AND MOTION TO STAY
PAYMENT**

An appeal having been taken, the defendant elects not to commence service of any sentence of imprisonment and also moves the Court for a stay of any sentence for the payment of money.

This election and motion is made pursuant to Rules 38(a) (2) and (3) of the Rules of Criminal Procedure.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,

By /s/ JOHN R. GOLDEN,
Attorneys for Defendant.

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

**COPY OF CRIMINAL DOCKET ENTRY
OF FEBRUARY 29, 1952**

Feb. 29, 1952. Ordered that the payment of the fines is stayed upon the filing of a bond in the sum of \$20,000.00 as security therefor.

[Title of District Court and Cause.]

MOTION FOR BAIL UPON REVIEW

The defendant moves the Court to allow him to remain at liberty on bail in a reasonable amount pending his appeal, which defendant intends taking forthwith.

This motion is made pursuant to Rule 46(a) (2) of the Rules of Criminal Procedure upon the ground that it appears that this case involves several substantial questions which should be determined by the Appellate Courts, as more fully appears from the transcript of the proceedings and all of the papers on file herein, which by this reference are incorporated in this motion.

JOHN R. GOLDEN,

LESLIE C. GILLEN,

SPURGEON AVAKIAN,

LOHSE AND FRY,

By /s/ **JOHN R. GOLDEN,**

Attorneys for Defendant.

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

**COPY OF CRIMINAL DOCKET ENTRY
OF FEBRUARY 29, 1952**

Feb. 29, 1952. Ordered that the motion for bail upon review is denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Elmer F. Remmer, Golden Hotel, Reno, Nevada.

Names and addresses of appellant's attorneys: Leslie C. Gillen and John R. Golden, 33 Post Street, San Francisco, California; Spurgeon Avakian, Financial Center Building, Oakland, California; and Lohse and Fry, 139 North Virginia Street, Reno, Nevada.

Offense: Violations of Section 145(b), Internal Revenue Code, 26 U.S.C. Section 145(b). (Four counts.)

Concise statement of judgment or order, giving date, and any sentence: On February 22, 1952, the jury brought in verdicts of guilty of Counts One through Four of the indictment. On February 29th, 1952, the Court entered its judgment and commitment and sentenced the defendant to Imprisonment for a period of five (5) years and to pay a fine of Five Thousand (\$5,000.00) Dollars on each of the four counts of which he was convicted and ordered the sentences of imprisonment on counts two, three and four to run concurrently with the sentence of imprisonment on count one, or, a total of five (5) years imprisonment and Twenty Thousand (\$20,000.00) Dollars fine.

Name of institution where now confined, if not on bail: Washoe County Jail, Reno, Nevada.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated February 29, 1952.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,

By /s/ JOHN R. GOLDEN,
Attorneys for Defendant.

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Defendant and appellant Elmer F. Remmer hereby designates as the record on appeal in the above-entitled matter, the complete record and all of the proceedings and evidence therein.

Dated this 3rd day of March, 1952.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,
By /s/ JOHN R. GOLDEN,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Instruction No. 1

There are certain general principles of law to which the Court desires to call your attention.

You will understand that under our system the Court and the jury have a divided responsibility. It is the duty of the Court to decide all questions of law which may arise during the progress of the trial, and the duty of the jury to pass upon the facts. If the Court is unfortunate enough to make a mistake in deciding those questions of law, there is another court which may be appealed to, to correct those mistakes. It is, therefore, the duty of the jury to take the law as laid down by the Court, because if the jury should undertake to determine what the law is, and should make a mistake, there is no way of remedying it. It is the province of the jury to pass upon the facts of the case, upon the credibility of the witnesses, and to apply the law to the facts of the case as they find the facts to be. The Court is just as little inclined to interfere with the province of the jury passing upon the facts of the case, as it is sensitive about having the jury to undertake to determine what is the law of the case. With this understanding of our respective duties, the Court states to you the following general principles.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 2

The indictment itself is a mere charge or accusation against the defendant, and is not of itself any evidence of his guilt, and no juror in this case should permit himself or herself to be to any extent influenced against the defendant because of or on account of the indictment.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 3

The indictment in this case charges violations of Section 145(b) of Title 26, United States Code, which so far as it applies here reads: " * * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter * * * shall * * * be guilty" of an offense.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 4

The indictment charges the defendant with six offenses or counts as follows:

Count One: That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year

1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$9,500.00 and that the amount of tax due and owing thereon was the sum of \$2,570.00, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$33,734.61, upon which said net income he owed to the United States of America an income tax of \$16,259.54. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Two: That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1944 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$9,500.00 and that the amount of tax due

and owing thereon was the sum of \$2,570.00, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of \$33,734.60, upon which said net income there was owing to the United States of America an income tax of \$16,259.54. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Three: That on or about the fourteenth day of June, 1946, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$28,888.68, and that the amount of tax due and owing thereon was the sum of \$13,072.02, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$37,157.10, upon which said net income he owed to the United States of America an income tax of \$18,586.83. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Four: That on or about the fourteenth

day of June, 1946, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1945 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$30,429.68 and that the amount of tax due and owing thereon was the sum of \$14,074.29, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of \$38,708.09, upon which said net income there was owing to the United States of America an income tax of \$19,649.82. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Five: That on or about the fifteenth day of March, 1948, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the

Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$11,244.79 and that the amount of tax due and owing thereon was the sum of \$2,776.87, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$94,235.84, upon which said net income he owed to the United States of America an income tax of \$61,341.68. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Six: That on or about the fifteenth day of March, 1948, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1946 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$11,244.79 and that the amount of tax due and owing thereon was the sum of

\$2,776.87, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of \$94,235.84, upon which said net income there was owing to the United States of America an income tax of \$61,341.68. In violation of section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 5

The defendant is presumed to be innocent at all stages of the proceeding until and unless the evidence shows him to be guilty beyond a reasonable doubt. This rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 6

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the

truth of the charges as contained in a court of the indictment, there is not a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.

Given:

/s/ ROGER FOLEY,

United States District Judge.

Instruction No. 7

You are instructed that the rule of law which throws around the defendant the presumption of innocence and requires the Government to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 8

You are to consider only the evidence introduced in this case. A conviction is justified only when such evidence excludes all reasonable doubt as the same has been defined to you, without it being restated or repeated. You are to understand that the

requirements that a defendant's guilt be shown beyond a reasonable doubt should be considered in connection with and as accompanying all the instructions that are given to you.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 9

Every person required to pay income taxes is under a personal duty to file or cause to be filed for him a proper income tax return. Bona fide mistakes should not be treated as false and fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of good faith as to the correctness of the statement which he signs, whether prepared by him or somebody else.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 10

It is not necessary for the Government to prove that the defendant received income in the exact amount stated in the indictment or that the taxes due on his income were exactly as stated in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial amount of income in excess of that which he reported on his income tax returns and

that he wilfully attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 11

To establish its case the government must prove both of the following elements: (1) That substantial income tax was due and owing from the defendant in addition to that declared in his original income tax returns; and (2) that the defendant wilfully attempted to evade and defeat such tax.

The gist of the offense charged in the indictment is wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt," as used in this law, involves two elements: (1) An intent to evade or defeat the tax; and (2) some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the calendar years 1944, 1945 and 1946 he had an income which was taxable, and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar years and which he knew it was his duty to state in his returns for such years.

There are various schemes, subterfuges, and de-

vices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.

If you find from the evidence beyond a reasonable doubt that the defendant did consciously, knowingly and intentionally fail to report or cause to be reported his true income and thereby the Government was cheated or defrauded of taxes, you may find that he intended to evade the tax. However, you must not convict the defendant unless the evidence has convinced you beyond a reasonable doubt that he knew he was doing wrong.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 12

The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money

may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 13

If you find that there were any gains, profits or income received by the defendant which were not reported, it makes no difference as far as the question of taxability is concerned whether such income was lawfully received or unlawfully received, inasmuch as both were taxable.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 14

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the method of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

The Government is authorized by law, if the

books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

If, at the end of a year, a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, if it is shown that he did not get it by gift or inheritance or loan, it may be inferred that it was part of his taxable income.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 15

The Government has placed before you evidence relating to the defendant's net worth at the end of each of the years 1943, 1944, 1945 and 1946. A defendant's net worth at a given time is the difference between all of his assets and all of his liabilities. Loans receivable are to be considered as assets and loans payable are to be considered as liabilities in computing the net worth. Increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute the defendant's taxable net income by this method you should add the defendant's living and other non-deductible expenses for

that year as shown by the evidence and the income taxes which he paid during that year to the increase in net worth. These expenditures should be added because they are not represented in the assets which the defendant has accumulated and are not deductible expenses.

Expenditures which are deductible under the income tax laws are immaterial and of no significance in computing net income on the so-called "net worth and expenditures" method. The law provides that a deduction shall be allowed for all the ordinary and necessary expenses paid or incurred in carrying on any trade or business. The term "ordinary and necessary business expense" does not have any specific definition, but it refers generally to expenditures which have a reasonable relationship to the carrying on of a business.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 16

If you find that the defendant had substantial taxable income for the years 1944, or 1945, or 1946 which he did not report on his income tax returns, then you may find that there was a substantial amount of tax due to the United States Government for such year by the defendant.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 17

As I have heretofore charged you, the defendant has been indicted under a statute which applies to "any person who wilfully attempts in any manner to evade or defeat any tax imposed," etc. With respect to the meaning of the phrase "in any manner," I charge you that Congress did not define or limit the methods by which a wilful attempt to evade and defeat might be accomplished. The indictment in this case charges attempts to evade taxes by filing false income tax returns. In event you determine that the income tax returns, or any of them, understated the incomes of the defendant, or his wife, you must then determine if such understatement was wilful.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 18

The Court instructs the jury that in every crime or public offense there must exist a union or joint operation of act and intention.

Intention is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 19

The word "wilful" when used in a criminal statute generally means an act done with a bad purpose, but the word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by disregard whether one has the right so to act.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 20

Since a state of mind is difficult to prove precisely, evidence of surrounding circumstances may be admitted to prove intent or knowledge. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 21

You may find that there is evidence of an intent to commit the crime of attempting to evade and defeat the payment of a tax, even though there is coupled with that intent the desire to suppress in-

formation for other reasons. Thus, even if you should find that the defendant desired to conceal his ownership of property from anyone, you may also find in addition to such motive the existence of an intent to defraud the United States of moneys due as income taxes and to attempt to defeat or evade such taxes.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 22

There is a distinction between civil tax cases and criminal tax cases. This is a criminal case. The defendant is charged under the law with the commission of a crime, and the fact that he has or has not settled a civil claim for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 23

The law requires that income tax returns (other than returns of corporations) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 24

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. Partnerships as such are not subject to income tax, but are required to make returns of income.

A partner in a partnership shall include in his individual net income his share of the net income or loss of the partnership. If he draws either more or less than his share, his income tax is nevertheless based on the share to which he is entitled under the partnership agreement.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 25

Every person subject to income tax shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income and the deductions, credits, and other matters required to be shown in any return under the internal-revenue laws.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 26

You are instructed that the defendant in this case is being tried upon the charges named in the indictment and no other charges. If you sus-

pect or believe from the evidence that some offense or misconduct or crime not mentioned in the indictment was committed by the defendant, but so believing, you nevertheless entertain a reasonable doubt as to whether such defendant committed the particular offenses charged against him in the indictment herein, you will resolve that doubt in favor of the defendant and return a verdict of "not guilty."

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 27

Money received as a gift or inheritance is not taxable income. The prosecution has the burden of proving to your satisfaction beyond a reasonable doubt that none of the money which it claims as taxable income came to the defendant or his wife as a gift or inheritance.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 28

Certain businesses were described in the income tax returns in evidence as partnerships. The law does not prescribe any specific form of agreement as a requisite for partnership status. A partnership is an organization of two or more parties who have intended in good faith, and acting with a business purpose, to join together in the present conduct

of an enterprise. The arrangement between them may be either written or oral, and can be either an express or an implied agreement. It is not necessary that they contribute equal amounts of capital, or devote equal amounts of time to the business of the partnership, or have an equal share in the drawings, or have an equal right to draw money out of the business. The important question is whether the parties, including the defendant, actually had the intent in good faith to join together in operating the business as partners.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 29

You are instructed that the law of California in effect during the years included in this case provided for membership or non-stock corporations and that such corporations did not issue stock.

This instruction pertains to the One Eighty-Six Club.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 30

Under the income tax laws, the net income of a corporation is not taxable to any of the shareholders unless it is actually distributed to them.

Given:

/s/ ROGER T. FOLEY,

United States District Judge.

Instruction No. 31

Liquor floor stock taxes assessed in 1944 could either be added to the cost of the liquor or could be treated as a deductible expense at the option of the taxpayer provided that such liquor was held in the course of a trade or business or for the eventual production of income.

This instruction pertains to the Gallagher and Burton whiskey transactions mentioned in the evidence.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 32

As previously stated to you, the income tax law provides that the net income of the taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping books of the taxpayer. In this case two methods of recording transactions in books of account have been referred to, one referred to as the cash method and the other as the accrual method. Under the cash method income is recorded as of the time it is actually received and expenses are included only when actually paid. Under the accrual method of recording transactions income is set up when the right to receive the money arises and expenses are set up at the time the liability is incurred.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 33

Evidence is of two kinds, direct and circumstantial. Direct evidence is that evidence which is given when a witness testifies directly of his own knowledge to the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances from which the jury may infer other and connecting facts, which usually and reasonably follow. Crimes may be proven by circumstantial evidence as well as by direct testimony of eye witnesses; but the facts and circumstances in evidence taken as a whole must be consistent with each other, and with the guilt of the defendant, and inconsistent with any reasonable theory of the defendant's innocence.

In a case of either direct or circumstantial evidence it is not necessary that the proof shall be conclusive. It is sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty, and that they have no reasonable doubt in their minds as to his guilt. If the jury believe the facts as shown by the evidence in this case as to any count are all consistent with the supposition that the defendant is guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find the defendant guilty of that count; but if the jury do not so believe, they should find the defendant not guilty of that count. All that can be required is not absolute and positive proof, but such proof as convinces

the jury that the crime has been made out against the accused beyond a reasonable doubt.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 34

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your minds, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 35

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of

expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 36

You are the sole judges of the credibility and the weight which is to be given to the testimony of the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of a witness' testimony, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has

testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If the jury believe that any witness has wilfully sworn falsely as to any material fact in the case, they may disregard the whole of the evidence of any such witness, except insofar as it is corroborated by other credible evidence.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 37

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence, or as to the credibility of a witness. In admitting evidence, to which an objection is made, the Court does not determine what weight should be given such evidence. As to any offer of evidence that was rejected by the Court, you, of course, must not consider the same. As to any ques-

tion to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 38

You are instructed that if the Judge has said or done anything which has suggested to you that he is inclined to favor the claims or position of either party you will not allow yourselves to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intimated nor intended to intimate, any opinion as to what witnesses are, or are not worthy of credence; what facts are, or are not, established; or what inference should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

The verdict to be rendered must represent the considered judgment of each juror.

In order to render a verdict it is necessary that each juror agrees thereto. Your verdict must be unanimous.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 39

The fact that an attorney may have during the course of the trial persistently or vehemently pressed argument in the interest of his client is not to be considered by you to the prejudice of his client.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 40

The matter of sympathy is not to enter into your deliberations. Every man who commits a crime is in one sense unfortunate. He is to be pitied, and those who are to share his suffering, and who are innocent, are also to be pitied; but that is one of the almost universal attendants and consequences of crime. Few persons can commit a crime unless some innocent person suffers in consequence. Your sole duty and my sole duty, under our oaths, is to ascertain and determine what the truth is. You are to determine whether a crime has been committed, and whether the evidence offered upon this witness

stand satisfies you of the guilt of the defendant beyond a reasonable doubt.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 41

A person charged with an offense against the laws of the United States shall, at his own request but not otherwise, be a competent witness. His failure to make such request and to testify as a witness shall not create any presumption against him; and no juror in this case should permit himself or herself to be to any extent influenced against the defendant because of, or on account of, his failure to testify as a witness in the case.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 42

It is your duty to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of

the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the guilt or innocence of the defendant for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 43

While you have a right to use your knowledge and experience as men and women in arriving at a decision as to the weight of the testimony and credibility of witnesses, yet your finding and decision must rest upon the evidence admitted in this trial. You cannot act upon the opinions and statements of counsel as to the truth of any evidence given, or as to the guilt or innocence of the defendant.

You must consider all the evidence in connection with the law as given by the Court, and therefrom reach a verdict; in doing so you must, without favor or affection, bias, prejudice or sympathy compare, weigh and consider all the facts and circumstances shown by the evidence, with the sole, fixed and steadfast purpose of doing equal and exact justice between the United States of America and the defendant at the bar.

Given:

/s/ **ROGER T. FOLEY,**
United States District Judge.

Instruction No. 44

The Court instructs the jury that you should weigh all the evidence before you and ponder upon the instructions of the Court, that you may not, perhaps, by careless disregard of your responsibilities, fail in conserving the rights of society, on the one hand, or, on the other, condemn to punishment one who may have done no wrong. Courts are only respected when there is an earnest desire and true endeavor on the part of all their officers to do right. Any departure from this justly arraigns the law tribunals for inefficiency, and excites public disregard and contempt for their decrees. Neither passion nor sympathy should swerve or sway, but you should keep as certainly to the course pointed out by impersonal justice as the needle is faithful to the pole. Thus only shall you escape an accusing conscience and redeem the oathbound obligations assumed by each of you at the time you were chosen to hear attentively, to consider wisely, and determine justly.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 45

The duty of counsel and of the Court has now been performed. Counsel have brought to your consideration facts and evidence which, in their judgment, will assist you in determining the truth. They have assisted you in marshalling and explaining the

testimony. The Court has endeavored to advise and correctly instruct you as to the law, and it now remains for you to perform the last and the most important duty in this trial, to determine the issue of guilt or innocence; and it is with the utmost confidence that I submit this case to you, believing that you will not permit your judgment to be unduly influenced by sympathy or sentiment on the one hand, or by prejudice on the other; that you will consider the law simply as it is given to you by the Court, and the evidence which has been introduced before you during the progress of this trial.

The liberty of the defendant is sacred; it cannot lightly be taken away. You cannot bring in a verdict of guilty until the guilt of the accused is proven by the evidence in the case beyond a reasonable doubt. The interests of the Government are also important; its laws are made to be obeyed, and if broken, they should be vindicated. If, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should bring in your verdict accordingly. You must be just to the defendant; you must also be just to the Government. Duty demands it, the law demands it, and your oath demands it. As upright men and women, as honest jurors, you are now charged with one of the most solemn and responsible duties of an American citizen, and I trust that you will perform it with an eye single to your duty, to your oath, to the law as given you by the Court, and to the evidence in the case.

It takes twelve to find a verdict. The Clerk, as a matter of convenience, has prepared forms of verdict which will be handed to you.

If you find the defendant guilty of any of said offenses charged in the indictment, you will insert the word "is" in the blank space before the word "guilty"; if you find the defendant not guilty of any of said charges, you will insert the word "not" in the blank space before the word "guilty."

In arriving at your verdicts, you may find the defendant not guilty on all counts or guilty on all counts, not guilty on some counts and guilty on other counts, or you may reach a verdict on some counts and fail to reach a verdict on other counts.

You will now retire to your jury room, and when you have agreed upon a verdict, you will have your foreman sign it, and notify the Marshal, and you will be returned into court.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed February 21, 1952.

In the United States District Court, for the
District of Nevada

No. 12,177

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELMER F. REMMER,

Defendant.

Before: Hon. Roger T. Foley, Judge.

HEARING ON MOTION FOR CONTINUANCE

Be It Remembered, That the above-entitled matter came on regularly for hearing before the Court at Las Vegas, Nevada, on Thursday, the 15th of November, 1951.

Appearances:

WALTER M. CAMPBELL, JR., ESQ.

MILES N. PIKE, ESQ.

Attorneys for Plaintiff.

LESLIE C. GILLEN, ESQ.,

GEORGE LOHSE,

Attorneys for Defendant.

The following proceedings were had:

The Court: In the case of United States of America vs. Elmer F. Remmer, No. 12,177, there have been several motions and I suppose it would

be logical to take up the motion for continuance first, would it not?

Mr. Lohse: Yes, your Honor.

Mr. Pike: The Court is familiar with the circumstance that Mr. Walter Campbell, with headquarters at San Francisco, who is attorney with the Penal Division of the Internal Revenue, is present in court and Mr. Campbell has the status of Special Assistant to the Attorney General for the purposes of this case and for the purposes of this case has the status likewise of Special Assistant to the United States Attorney for this district. Mr. Campbell is familiar with this case. He has worked on it and he is present in court for hearing of this motion.

Mr. Gillen admitted for purpose of this case.

Mr. Gillen: Does your Honor desire I proceed?

The Court: Yes.

Mr. Gillen: May it please the Court, there are two motions your Honor mentioned and I thought the logical way to approach the problem was on the motion for continuance. I believe this, your Honor, I believe that both motions pretty well dovetail one into the other and I think can be followed by your Honor very readily because the second motion, which your Honor so kindly shortened the time, is whether, in respect under Rule 16, would ultimately, for its ultimate time, require some further time before proceeding to trial, so I think both matters could be addressed to your Honor at once.

May it please the Court, Mr. Lohse, the Nevada counsel, filed, on behalf of the defendant in this

case, the initial motion for a continuance upon the several grounds that are set forth in his motion and mentioned in his motion that the motion would be supported by affidavits which would subsequently be presented. Those affidavits are now in court and were served on opposing parties and address themselves, I believe, in support of both motions. I might state to your Honor also that counsel, Mr. Lohse, in his motion mentioned the date of April 1st as the requested continued date, and I might say to your Honor that that is an arbitrary date. We have in mind discussing it with Mr. Lohse; that our problem here is an efficient accounting analysis and we have in mind that accountants are busy in the early part of the year up until the middle of March, for reasons that we are all acquainted with, so in the event your Honor did entertain our motion, the date of April 1st is not the necessary date, as far as we are concerned.

The Court: Before we proceed, would it be well to have Mr. Lohse entered as attorney of record?

Mr. Lohse: Your Honor, I filed the motion for continuance and signed as one of counsel for the defendant in the action and filed that with the clerk in Carson City and presumed, after talking the matter over with Mr. Pike, that would be sufficient filing of notice of my association in the case.

Mr. Pike: Yes, I see no objection to the Court entering order recognizing George Lohse as one of counsel.

The Court: Is it you personally?

Mr. Lohse: The firm, your Honor.

The Court: Proceed.

Mr. Gillen: May it please the Court, on the initial motion for continuance filed by Mr. Lohse on behalf of this defendant very sketchily the grounds set forth are that primarily the defendant was not given a reasonable opportunity to prepare his defense in this matter and that is based upon the fact that, as we contend, the government has, and is, withholding certain documentary evidence which it is necessary for our accountant to see and for the attorneys to see, in order to adequately present a defense in the matter.

Secondly, that the government has, by an arbitrary assessment, tied up all the available assets of the defendant in this case and that has seriously hampered the defendant in being able to have means to provide himself with adequate services of accountants, as well as counsel, and in that regard, may it please the Court, it will be noted later in the affidavits, if your Honor has not had opportunity to read those affidavits, in that regard there was a request made that there be released for the defendant for his defense certain of his liquid assets, and in that regard it was offered, and we were prepared to file, a surety bond to protect the government in the amount that the government saw fit to release to us.

Another condition was imposed by the government that we felt, as lawyers, we could not conscientiously recommend that our client comply with, and that will be set forth in the affidavits, and also that one of the complications in this matter, which

makes it so difficult for us, is that there are approximately, to our knowledge, nine business enterprises involved and requires a very comprehensive study by the accountants in order to be able to furnish the attorneys with sufficient evidence to enable them to present a proper defense; and finally, may it please the Court, supporting our motion for a continuance, it is set forth that the indictment itself, being pleaded under the simplified form, there is absolutely nothing, excepting that the contention of the government is that for certain years certain amounts of taxes were due and were not paid, and although the bill of particulars was requested and refused by the government, and also the matter was taken up and upon showing in a former matter before your Honor, we were denied bill of particulars, which leaves us in very bad position in not having sufficient accounting study, not having means to provide such a thing, not having documents to work with and not having any particulars from the government regarding its contention.

Then finally, with regard to the second motion, may it please the Court, that is based upon our contention, under Rule 16, that we have not had an adequate opportunity to inspect and obtain information from documentary evidence which the government is withholding from us and which it is the government's contention is evidence of business interests or partnerships, some of which we know about and some of which we are doubtful whether we know about and we contend, of course, that we are entitled, under the rule, to examine those docu-

ments and determine the merit of the government's contentions and to possibly explain to the government and to the Court that there is no merit in many or most of the contentions.

Now if the Court would permit me, I would like to read the supporting affidavits. There are two, one of which is made by my associate, Mr. Golden, who was before your Honor on the matter of bill of particulars, and the other made by Mr. Spurgeon Avakian, whom as your Honor is undoubtedly acquainted, is a specialist in tax law and has been appointed by Mr. Golden and myself as the technical expert in the matter, because we are just ordinary run of the mill lawyers and do not propose to know too much about tax law. With your Honor's permission, I would like to read these two affidavits and I believe they will assist your Honor to follow our motions. Shall I proceed?

The Court: Yes.

Mr. Gillen: The first is in the United States District Court for the District of Nevada, United States of America against Elmer F. Remmer, No. 12,177, "Affidavit of John R. Golden in Support of Motion for Continuance and of Motion to Inspect and Take Copies." (Reads to line 24, page 3: " * * * for the forthcoming conference with the Department of Justice: * * *") I might say to your Honor that I was in Washington, D. C. on this matter in February of 1950 and at that time it was discussed that there would be another hearing on the matter, and I might state to your Honor that through correspondence there was another hearing

arranged for Mr. Avakian, who had come into the case in the interim, and I might say Mr. Avakian and I were to make that trip together, referred to in the affidavit, and in fact had our airplane reservations and reservations at the Mayflower Hotel. We were to leave the day following the day of the receipt of the letter that the contemplated conference had been arbitrarily cancelled and the matter had been referred to Mr. Pike, United States attorney in Nevada.

Now if I may proceed with the reading of this: (Continues reading to end of affidavit. Containing also the federal jurat.)

Now if I have the permission of the Court, I would like to read the further enlightening affidavit of Mr. Avakian. (Reads to line 20, page 3.) I might state I was also engaged in the same trial Mr. Campbell was engaged in at that time. (Continues reading to bottom page 3.) And this is letter from Mr. Campbell. I might state to your Honor there is a portion left out. I have a copy of the letter. We feel the portion omitted has nothing to do with this.

The Court: Unless counsel think it necessary to read the portion not in the affidavit—

Mr. Pike: That will be handled subsequently. We suggest the affidavit be read as it is.

Mr. Gillen: All right; we will read the affidavit: (Reads) L. 26, page 3—" * * * You wish to arrange to examine such records in preparation for the trial of the case.' " Then this *delated* from the

paragraph which Mr. Avakian did not consider pertinent to the matter, and I have it, it appears next to the last paragraph of the letter. (Continues reading from affidavit to bottom of page 3,) And the emphasis is added by ourselves. That is the end of the letter. Resuming the affidavit: (Completes reading of the affidavit.) And bears the federal jurat.

Now I think perhaps, your Honor, it would be well for me to bring to your Honor's attention in further detail than appears in these affidavits the portion of the letter from Mr. Campbell to Mr. Avakian of November 6, 1951, which was omitted as not being pertinent, but it is pertinent because of a letter that followed from Mr. Avakian to Mr. Campbell. Probably to pick up the *threat* of our thoughts, we had better read the first paragraph of Mr. Campbell's letter and then the next paragraph will be the paragraph that was omitted from the letter as stated in the affidavit. This is the Walter Campbell letter to Spurgeon Avakian on November 6, 1951:

“Dear Mr. Avakian:

“Reference is made to your letter dated October 23, 1951, concerning records of some of Elmer Remmer's ventures, which records you believe are now in the possession of the Bureau of Internal Revenue. You wish to arrange to examine such records in preparation for the trial of the case.”

This is the next paragraph that was omitted, your Honor:

"We are familiar with the circumstances under which Lawrence Semenza * * *"

That is the accountant in Reno:

"* * * under which Lawrence Semenza received some of the records in the case from Special Agent Ray A. Weaver, giving him a receipt for them, and agreed to return them to Mr. Weaver * * *. At that time Mr. Semenza had on file power of attorney, authorizing him to represent Remmer before the grand jury. At a later time return of the records was sought from Semenza, who was unable to carry out his undertaking because he had turned them over to another accountant representing Remmer. It is our belief that counsel for the taxpayer had it in their power to enable Semenza to fulfill his undertaking, but declined or refused to do so."

Mr. Campbell: Read the first sentence of the succeeding paragraph.

Mr. Gillen (Reads): "In the light of the foregoing, we do not feel justified in permitting any of the records involved in this case to leave possession."

Mr. Campbell: To leave our possession.

Mr. Gillen: Evidently an error, was omitted in the copy of the letter I have here. I suppose it should be "to leave our possession." Now, may it please the Court, Mr. Campbell then winds up his letter:

"As Mr. Remmer's representative, you are, of course, entitled to see any records of his which we may have, providing proper showing is made as to his interest * * *"

Now you see what is happening there, may it please the Court, is that first of all we are informed that the government does have records, our accountant, Mr. Semenza, tells us he walks into a stone wall at this point. It is first admitted that the government has admitted they have records, then a condition is laid down. We have to know what the interest of the defendant was, says Mr. Campbell. Mr. Avakian counters by saying if the government contends that Mr. Remmer has an interest, isn't that sufficient, then it is up to us to find out what you *content* and attempt to explain it. Then Mr. Campbell puts a further condition. He says: "We have those records—if we do have the records—from third persons and you are going to have to get permission of those third persons before we can show you those records," and Mr. Avakian says, "Well, if you will tell us who those third persons are and what those records are, although we do not think we have to, we will try to get their consent and try to furnish you with the information of how many business enterprises there were"; then in his letter of November 6th Mr. Campbell goes further: "You remember something happened on the matter when the records were turned over by Mr. Weaver to Mr. Semenza and Mr. Semenza did not give them back because he did not have them, and we think one of the counsel kept that from being done," and it has been, if I may say so respectfully, it has been a matter of bringing up new conditions and playing cat and mouse. First of all, "we have certain records and if you want

them, you have to tell us what the records are and you have to get permission of the people from who, we got them; maybe we have the records and maybe we don't. You tell us what the interest of Mr. Remmer was, what was the contention of Mr. Remmer as to his interest in these and you tell us who the third parties are," and we are unable to do those things and all the time admitting, under Rule 16, we are entitled to see these records.

Now there is something further interposed in this November 6th letter and that is, then Mr. Campbell says in effect "We do not trust you any more because once you got some records from us and we didn't get them back, and for that reason we do not want records to go out of our possession." We are not asking for records to go out of the government's possession. We are simply asking for rights, under Rule 16, to go and look at the records, inspect them, get the information out of them that will enable our accountant to make an intelligent analysis and will enable him fully then to prepare us for the defense in this case.

Now may it please the Court, I think in view of that little condition that is brought up here, I think it would be well if I may impose upon the Court's time to read Mr. Campbell's letter of November 6, 1951. I should like to read copy of the letter then sent by Mr. Avakian to Mr. Campbell in which, in my opinion, the Semenza incident that is bothering Mr. Campbell seems to be very fairly explained, and also the exact position of the defense. May I have your Honor's permission to read that letter.

This is on the stationery of Phillips and Avakian,

Financial Center Building, 14th at Franklin, Oakland, 12, California, and some other references to the members of the firm. It is dated November 9, 1951, addressed to Mr. Walter M. Campbell, Jr., Regional Counsel, Penal Division, Bureau of Internal Revenue, 100 McAllister Street Building, San Francisco, California:

“Dear Mr. Campbell:

“Thank you for your letter of November 6, 1951, in response to mine of October 23, 1951, in which I requested the opportunity to examine * * * ”

Mind you, your Honor, “to examine,” not “to take possession”:

“* * * any records in the possession of the Bureau of business ventures in which Mr. Remmer had an interest.

“Your letter does not state that you do have such records in your possession, although that conclusion could be implied from your letter as a whole. You state that we are entitled to see any of Mr. Remmer’s records which you may have in your possession provided the proper showing is made as to his interest and provided further that we furnish you with the written consent to such inspection of the third parties from whom the Bureau obtained the records. You also state that you can not permit us to take possession of these records because of the incident described in your letter in which Mr. Semenza was unable to return records which were released to his possession by Special Agent Weaver.

“Your letter leaves me confused and uncertain

as to a number of matters, and, in addition, I believe that some clarification is needed of your understanding of the Semenza incident. To facilitate the examination by us in preparation for trial of any records which we are lawfully entitled to examine. I wish to set forth our position and request clarification of yours in the following respects:

"1. Does the Bureau now have in its possession records of businesses in which Mr. Remmer had an interest? If so, may we have the immediate opportunity to examine them for such periods of time as may be reasonable, considering the volume and contents of the records?

"2. I do not know just what you have in mind when you state that a condition of our examination of any such records is the making of a 'proper showing' as to Mr. Remmer's interest. If the government contends that Mr. Remmer has a proprietary interest in the profits of a particular business and that he is accordingly taxable on some or all of the income therefrom, does not that of itself require the government to recognize the principle that a man is entitled to examine his own records in preparation for trial? Should you not, in good faith, permit us to examine the records of all businesses which you will contend at the trial were owned either wholly or partially by Mr. Remmer? Can you tell us what type of showing you want?

"3. I can neither understand nor justify your statement that the inspection will be conditioned upon the submission of the written consent of third

parties from whom such records were obtained. In the first place, we do not know what records you have nor the businesses to which they relate nor the names of the third parties from whom they were obtained. Furthermore, I know of no legal authority which requires the consent of third parties before a taxpayer can examine his own records. So far as I know, the owner of records is not only entitled to examine them, but is also entitled to possession of them. The right of the Bureau of Internal Revenue in this respect is specifically limited by Section 3614 of the Internal Revenue Code to the right 'to examine,' and even that right of examination is limited by the Fourth Amendment to the Constitution, which gives a person under criminal investigation the legal right to withhold his records from examination by the government if he desires. The limited time between now and the commencement of the trial on November 28 makes it impractical for us to obtain a ruling from the court on this matter. Whatever our feelings may be as to the illegality and unfairness of the Bureau's position, we are forced as a practical matter to meet whatever conditions you may impose upon our examination of these records, if that will enable us to prepare for the trial. Accordingly, if the government insists upon our furnishing the written consent of such third parties, will you please advise us immediately of the names and addresses of such third parties and of the particular records which they turned over to the government, so that we can seek to locate these people and re-

quest their written consent. It is to be understood, however, that our compliance with this condition would be under protest and would not be construed as a relinquishment in any manner of any of the rights of our client.

"The denial of our Motion for Bill of Particulars leaves us in a difficult position for preparation of trial. The indictment alleges only a total sum as the net income for each year. Although Mr. Remmer reported income from a number of different enterprises during this period, the indictment does not state what his correct income from each enterprise is alleged to be. We do not know whether you are challenging the correctness of the reported income from all of these enterprises or only some of them. Neither do we know, as to any particular enterprise whether you are questioning the total income of the enterprise or only the percentage allocable to Mr. Remmer. The task of analyzing these complex factors has been aggravated by the fact that, since 1948, Mr. Remmer's assets have been frozen by tax liens based on arbitrary assessments now aggregating over \$800,000. This has made it impossible for him to retain the necessary accounting and legal advisors to litigate the validity of that assessment or to make timely preparation for the criminal case. In 1950, Mr. Golden offered to post a surety company bond fully protecting the government, if the government would release a few thousand dollars. The Treasury Department refused to release any portion of the funds except on bond covering the entire assessment. That, of

course, was an impossible as well as unnecessary condition. In March of 1951, immediately after I entered the case, the request of Mr. Golden was renewed, and the Bureau's Washington office communicated to us, through you, its willingness to release a portion of Mr. Remmer's assets, in order that he might finance his preparation for trial, but only on condition that he first submit a detailed financial statement showing his assets and liabilities at that time. That condition was also impossible, since the financial statement could be prepared only after the accounting work was done, and in addition it would require the expense of a current audit, as well as one covering the years 1944-46. Furthermore, that condition seemed unnecessary, because we were willing to protect the government with a surety bond covering the amount of assets released." In other words, it just became a vicious circle. If you tell us everything you have in mind as to your assets, we will release you some money, so that you can make an analysis of your assets. We say, "Well, we will put up a surety bond, but we can't tell you what our assets are without having an accountant, whom we need money to pay to make the analysis, so we will be able to tell you what our assets were." We are just going around in a circle.

Resuming the letter, may it please the Court:

"The result of all these factors has been to place grave obstacles in the way of our effective representation of our client. Whether intentionally or not, the government has effectively curtailed Mr. Remmer's ability to have his case prepared adequately.

You already know my views in that regard, and I believe you know my feeling that if you personally had held full responsibility in this matter, we would have been treated with fairness more becoming to a democratic government. I repeat these facts to emphasize the importance to us of having access to the records in question at the earliest possible date, and not as any criticism of you. We realize that government policy is dictated by many people.

"You subsequently informed me that your Washington office was willing to accept a detailed list of assets and liabilities, without valuation. That was somewhat less burdensome than the earlier condition but still would require considerable accounting, and it was equally unnecessary since the bond would fully protect the government.

"4. Your reference to the Semenza incident is written in such a way as to indicate criticism of Mr. Remmer's counsel for not furnishing the records in that case. You state that at some time in the past, Special Agent Weaver had turned certain of Mr. Remmer's records over to his accountant, Lawrence Semenza, on the understanding that the latter would return them to him on notice. You state that 'at a later time return of the records was sought from Semenza, who was unable to carry out his undertaking because he had turned them over to another accountant representing Remmer. It is our belief that counsel for the taxpayer * * * had it in their power to enable Semenza to fulfill his undertaking, but declined or refused to do so.' You will recall that the request of Mr. Semenza to re-

turn the records in question was in the form of a subpoena from the grand jury served upon him very shortly before the session of the grand jury at which he was directed to appear, in April, 1951. Mr. Semenza learned from inquiry of the other accountant that the records were in the office of John R. Golden, who had been counsel for Mr. Remmer in connection with this matter for some time, and still is. Because Mr. Golden, a reserve officer, was at that time engaged in two weeks of active military service in the Army, Mr. Semenza contacted me, and you will recall that I then telephoned you and advised you in substance as follows:

“a. Since I had just been associated into the case I did not know the contents or significance of the records in question.

“b: Because Mr. Remmer’s assets had been frozen for over two years by a tax lien and because the government had declined to release any portion of these funds, even though we had offered to post a bond fully protecting the government with respect to the portion released, it had been impossible to finance an accounting analysis of the records or of the case generally.

“c. I did not know the names of the third parties from whom Mr. Weaver had initially obtained the records or whether he had obtained them in the manner provided by law. Furthermore, I did not feel that his return of them to Mr. Remmer’s representatives was a matter of charity on his part, since Mr. Remmer, as the owner of the records, was entitled to them at all times anyway, and the gov-

ernment at most had the right of inspection, not of possession. Accordingly, any condition exacted by Mr. Weaver from Mr. Remmer's accountant without the knowledge and consent of Mr. Remmer or his lawyers was of no legal effect.

"d. Mr. Remmer was out of town and Mr. Golden, although stationed at the San Francisco Presidio, would not be available for extended consultation until a few days later.

"e. If you would advise me in at least a general way as to the contents or significance of the records in question, I would then be in a position to make an intelligent appraisal of the matter and possibly feel free to make the records available on my own responsibility. You stated that you did not feel free to disclose such matters. I told you that a relinquishment of such papers to the grand jury by Mr. Remmer's attorney might be construed as a waiver of his constitutional rights, and that I felt I would be violating my professional responsibilities as a lawyer if I took such action without first consulting my client, particularly since I was in ignorance of the facts and you were not in a position to enlighten me. I further pointed out to you that the primary reason for my unfamiliarity with the accounting features of the case was the government's refusal to release assets (even on a bond) to permit us to finance the extensive accounting analysis this case requires, and the government's further refusal to give us any indication of the issues of the case (contrary to the general practice in such cases.) As you knew at the time, the gov-

ernment even cancelled a conference in Washington which had been scheduled for a date several weeks in advance of the indictment.

"f. I further stated to you that, under all these circumstances, I did not feel that we should be asked to decide, in a period of a day or two, and without consultation with our client, an important matter affecting his constitutional rights, particularly since the government, up to that point, had denied to us the benefit of administrative conferences customary in cases of this kind. Realizing the possible embarrassment to Mr. Semenza, I suggested for your consideration the possibility of subpoenaing Mr. Golden before the grand jury, since he was the person in actual possession of the records. In that way, the grand jury could have had the records without any waiver of Mr. Remmer's legal rights.

"I regret that you feel that we acted improperly in that regard. Even if we were wrong, however, I do not see that the government has been prejudiced. In the seven months which have elapsed since the grand jury session, the government has not directly or indirectly requested an opportunity to examine these records, which would indicate their relative unimportance to the government. In any event, it has been my consistent experience that Special Agents do not voluntarily relinquish taxpayers' records without first carefully copying or summarizing all pertinent information, and I doubt that Mr. Weaver was negligent in that regard.

"I trust that you will promptly arrange for examination of these records by us, in view of the

imminent trial date. Since you have been engaged in a trial continuously during the past six weeks, it has been impossible to discuss this matter with you directly except for several very brief telephone conversations. I appreciate that the requirements of that trial on your time have prevented you from giving extended consideration of this problem; and I can understand that, as a lawyer bound to protect the government's interest, you did not want to decide this matter without careful thought, any more than I wanted to make a hurried and haphazard decision last April in the Semenza incident mentioned above.

"Now that your trial has been concluded, I hope that you can give immediate attention to this matter.

"Sincerely yours,

"SPURGEON AVAKIAN."

May it please the Court—you have indulged me very kindly in reading all these matters—I thought they would be helpful to your Honor—may it please the Court, our suggestion is simply this: Of course from the very outset—and I say this, we try to be brave as possible and not cry babies—but from the very outset in this case we have received from the hands of the government special treatment within my knowledge, because I attended a conference in Washington in February, as I told your Honor, that initially we were specifically told that the year 1944 was not being considered in this investigation at all and then at a very late date in December,

either November or December, I am sure it was December, of 1949 we were suddenly told that 1944 now was being considered by the government and we had better hurry and do something because the statute was running and thereafter, of course, we were given special treatment by having a promised conference cancelled arbitrarily and the matter being directed to the attention of Mr. Pike here and the machinery set in motion for indicting the defendant in this case, and also the fact that the defendant was practically put in a straight jacket, from a financial standpoint, to properly prepare himself so he could explain his position, but is called upon to walk the plank, so-called, bindfolded, not knowing what the government has had or contends, because of the simplified form of pleading and because of the various other things that were done to place obstacles in his path. I want to say, not facetiously, in this particular country, which is noted for its outdoor sportsmen, a mallard duck at the hands of the hunter would be given fairer treatment and given a chance at least to get out of the way than Mr. Remmer has been given thus far by the government. I do not say that facetiously. It is probably a trite comparison, but that is the fact of the matter and whoever is responsible for it, I don't know, but there have been things done here so that we run around in a circle and we find doors closed on us at every turn and we are in a position now that we are compelled to go to trial without proper preparation, or without opportunity to examine these documents. Whether they

have merit or not, we do not know; how they were obtained, whether obtained in an unlawful seizure, concerning which the United States government is very strict in our courts, we do not. All those things we would like to go into and have the right to go into those things and if we are forced to go to trial November 28th, we are going into trial in such an important case, with so many complexities, wholly unprepared to give our client proper representation.

May it please the Court, it may be pointed out to your Honor by opposing counsel here that it is a long list of attorneys that have from time to time stepped in and out of the scene in connection with Mr. Remmer's affairs and there have also been several accountants who have appeared briefly and have left the scene and now disappeared, and that is entirely true, and the explanation for the whole thing why the man had so many attorneys that came and went is the fact that the man has never had the adequate means to retain those attorneys and those accountants and it is only people who were willing—if I may use the term—to gamble with him and help him out, because we feel he is being placed at a very great disadvantage and an injustice is being worked upon him, that he has the services of the attorneys he has now and the services of Mr. Semenza.

I submit the matter to your Honor.

Mr. Pike: Your Honor please, in order that there may be no lack of clarity as to the government's position, government's counsel are obliged to

resist, and do oppose, a granting of both motion for continuance of trial date, which is presently November 28, 1951, and the motion for an inspection and to make copies of the records.

As Mr. Walter Campbell's name appears in the affidavits, reference has been made to him in the correspondence likewise read to the Court this morning, he will present factually to the court matters as to the reasonableness and the timeliness of these motions. It is noted by the Court at the outset, of course, that many of these matters referred to in the affidavits are antecedent and many of them are not antecedent. As stated in Mr. Spurgeon Avakian's letter of November 9, 1951, to Mr. Walter Campbell, some seven months have elapsed since the return of the indictment in this case, and whoever may have been counsel for the defendant prior to that time, it appears that at least for the last seven months past all of the present counsel for Mr. Remmer have continued in that capacity. This case was initially set for trial on the 7th of November of this year and then, due to circumstances in connection with a case that lasted longer than contemplated—

The Court: It was first set for trial November 7th.

Mr. Pike: Correct.

The Court: And then because the Court was engaged in an action that required a week or ten days longer than expected, we had to move the present case back from November 7th to November 28th.

Mr. Pike: Correct. We have subpoenaed wit-

nesses, we are prepared to go to trial, and the government opposes the granting of either of these motions.

Now as to the motion to inspect the records, it is recognized that under Rule 16 there are rights given to inspect and it is not an arbitrary attitude to deprive the taxpayer or the defendant in this case of any of his substantial rights, but as will be developed factually before the Court, those rights have been exercised, at least in very large part, as will be demonstrated to the Court by Mr. Campbell, so I reiterate that we are obliged to resist on behalf of the government both of these motions.

Mr. Campbell: If the Court please, if I may be heard very briefly. I filed with the clerk of the court this morning a rather hastily prepared affidavit, which has also been served upon opposing counsel, the moving paper having been served on me and Mr. Pike on Tuesday of this week. I will read this affidavit, except for portions which will be portions as set forth by affidavits read by Mr. Gillen: (Reads to Line 18, page 2 of affidavit—“* * * appear in his behalf; * * *”

Parenthetically I say that applies not only to attorneys appearing in his behalf but also to accountants appearing in his behalf.

(Continues reading to Line 6, Page 3.)

Might I state parenthetically that the last power referred to in this affidavit is the present power of attorney which is pending before the Department and so far as my knowledge at this time is con-

cerned, there have been no revocations by the defendant in this case or withdrawal by any of the attorneys or the accountant mentioned, so that it would appear of his present representation that of Paul Dillon, attorney-at-law, has continued since April 29, 1949, Lawrence Semenza, certified Accountant, since June 2, 1949, at the very least that of other attorneys that now appear in this case, William K. Woodburn, John P. Thatcher, Leslie Gillen and Paul Dillon, as attorneys-at-law, since March 10, 1950. Reading from the affidavit again: (Reads commencing Line 6, Page 3, to Line 18.) And I, in the affidavit, state the letter to Mr. Avakian, which sets out in full reply of November 6, 1951, which has heretofore been read. And the affidavit concludes:

“That by reason of the foregoing affiant believes and therefore states the fact to be that the defendant has had ample opportunity to prepare the defense of his case and that the motions for a continuance and for inspection of records should be denied.”

Now, if the Court please, in connection with this case there did come into possession of the government records of certain businesses. None of these records were placed in the government's possession by the defendant in this case, nor were any of his personal records as such given to the government by the defendant or by any of his representatives. The government is still in possession of certain fragmentary records which were delivered to the government by third parties and which relate to

such enterprises as One Ten Eddy Street; referred to 186 Club, Menlo Club, and certain miscellaneous cancelled checks and bank statements of various purported businesses. In addition to those records the government also previously had in its possession, and obtained from third parties—I might say none of the records referred to which I am referring, or any of the records in connection with this case, were obtained by the government either by process or by seizure; all records were given voluntarily to the government by third parties.

As stated in the affidavit, in connection with work which Mr. Semenza was doing, which was prior to the indictment in this case, Mr. Semenza called upon Special Agents for permission to examine those records in connection with certain work he was doing for Mr. Remmer. It was found more convenient for Mr. Semenza to take those to his office. Mr. Semenza, of course, is a highly reputable certified accountant in this State. Inasmuch as the records have been obtained from third parties, to whom the Special Agent, of course, owed a responsibility to return them if called for, whatever their original sources are, the receipt from Mr. Semenza was obtained to agree, if they became necessary for purposes of the government, to restore them to the Special Agent. Prior to the indictment, and in preparing the present case to the grand jury, Mr. Semenza was called upon for the return of those records. To his embarrassment he found that they had been placed, without his approval, by reason of the fact that Mr. Friedman, another accountant—

his appearance in the case is shown by powers of attorney—he turned these records to Mr. Friedman, who in turn in November, when he terminated his employment, turned them over to Mr. Golden. It was the government's position, and is now, that both Mr. Semenza and Mr. Golden, so far as the Treasury Department were concerned, were attorneys of record and both had power of attorney, giving them the right to appear for and on behalf of the defendant Remmer. We therefore, as appears from the correspondence, feel it was a situation of one attorney, joined co-counsel, you might say, refusing to honor the obligations or undertaking which had been entered into in good faith by Mr. Semenza. Be that as it may, however, Mr. Semenza was given a subpoena duces tecum, but he repeated substantially the same story before the grand jury that he was unable to produce them. I do not believe there was no responsibility of Mr. Avakian to continue to make further requests of defendant's counsel when they had so clearly indicated that they would not return these records. Possibly it is true that because of that experience, the government has insisted, and does insist, upon the letter of its rights, so far as these records are concerned.

Now I might state to the Court that these records, to which counsel previously referred, the records which are still in possession of the government, have been examined, and I believe in detail, by the representatives of the defendant Remmer. That examination was conducted as a result of conference had with counsel and representatives of the tax-

payer. I might state parenthetically there have been so many accountants and certified public accountants all at the same time representing this man, I do not presume probably any one of them knows the entire story of the transactions, but nevertheless, by reason of arrangements, made by Mr. Golden in behalf of Mr. Friedman, who also had power of attorney and is a certified public accountant of San Francisco, access was given to him of these records during the time of his employment. I am advised Mr. Friedman, together with some associated accountant in his office, spent approximately a week going over these records. Whether or not the information contained is available to their defense counsel, I do not know. I presume it is. However, that is a basis of our resisting this motion at this late date, because the defense has had in its possession, or the possession of representatives of the defendant, the information which they now seek.

Now I wish to add this. There has been considerable made about the letter which I sent to Mr. Avakian under date of November 6th. As I stated here, and as I stated to Mr. Avakian and stated as early as May 25, 1950, to Mr. Golden, and Mr. Golden represented the taxpayer, we had obtained these records from third parties and therefore we had to protect the custody of those records. All that we have asked here with their motion under Rule 16, is that they make some showing that these records are the records of Mr. Remmer. The rule is very clear and concise. It states:

"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable * * *" etc.

And certain of those alternatives should be eliminated. We have no records which were obtained from the defendant. We have no records which were obtained by seizure or by process. It leaves the alternative set forth in the section of "records belonging to the defendant but obtained from others," and giving them inspection of those. We have sought in our condition that the defendant make some showing, some representation that they are his records, before we permit that inspection. That is simply what the matter amounts to.

Now so far as release of funds which were taken under jeopardy, as your Honor is aware, the government has the right and it is an unusual power and rarely exercised, where the Commissioner feels, has reason to believe—must be based on reasonable cause—that the interest of the government require, for fear of dissipation or destruction or disappearance of assets of the taxpayer against whom a claim is pending that that might occur, the Commissioner has the right to levy a jeopardy assessment and file

liens clouding the title of property belonging to the taxpayer. In this instance, without going into the reasons, because they are not material here, the Commissioner exercised that legal right and there is at the present time some \$35,000 in cash which is tied up in escrow in Reno. The defendant, through counsel, has sought that the Commissioner exercise a discretion in levying his lien to the extent that this fund of \$35,000 can be released for the use of Mr. Remmer in his defense. The Commissioner requires that a proper showing be made that it is necessary that these funds be released and for that purpose the Commissioner has required, and does in all cases require, that where such a levy is proposed that the taxpayer himself show that he does not have other funds with which he can meet those matters, so as to justify the Commissioner in releasing that money which the government has, and it is for that reason that the Commissioner requested of the defendant here, through me, that a present statement of assets, which would have no effect that I could see upon the issues of the case to be tried, because we are asking what he has today, not what he had back in 1944, '45 and '46—we are asking for his statement of assets and liabilities, in order that the Commissioner may determine that there exists a need and that he is without funds otherwise to protect himself. As I say, however, that is an administrative matter in which the Commissioner is clothed with a discretionary power and it seems to me it is not an abusive discretion on the

part of the Commissioner, and, of course, the matter of whether or not it is an abuse is not before this Court in any proceeding pending here, but it clearly would not be an abuse of discretion for the Commissioner to require, over the signature and oath of the defendant, that he does require these funds, that he does not have assets available which are not tied up, with which he can defend himself.

I wish to point out to the Court there are several matters in these affidavits, of course, in this last letter of Mr. Avakian, which was read to the Court, which I just received Tuesday afternoon, there are various matters which we do seriously controvert. However, I do not think that is material to the matter here, other than to point out, so far as accounting preparation of this defendant is concerned, there has been ample opportunity afforded the defendant on that prior to his indictment and that about seven months has elapsed since his indictment, with which to prepare these matters; that statement in the affidavit that Mr. Semenza finally agreed in September of this year to undertake the representation, by reason of the fact that Mr. Semenza's power of attorney to represent this man has been on file continuously since 1949, and as I said, to our knowledge, Mr. Semenza did secure certain of the records, which are still in possession of defendant's counsel, for the purpose of representing Mr. Remmer.

So under all these circumstances, if the Court please, I wish to join with Mr. Pike opposing the granting of either of these motions.

Mr. Gillen: I would like to reply briefly, may it please the Court, to some of the observations made by counsel. May this remark be received with the spirit in which it is given to the Court.

I might say this, your Honor, I am not totally ignorant of the problems that beset the gentlemen who sit on the opposite side of the table. I have never held as prominent position as either, but for as long as 13 years I was senior control deputy for the district attorney in San Francisco, and we did adhere, not only to our consciences or sense of morals, but to the admonitions many times given by the Court to members in our profession and the District Court of the United States, as well as the Supreme Court and many of our States, that prosecutors of a person should be as concerned that the person has an opportunity to fairly defend and he should not be put at an undue disadvantage, as they are concerned with bringing to justice a person that should be brought to justice. Now I should feel, if I were back in my old position as a prosecutor for the State of California and my native city San Francisco, that placing so many un-American obstacles in one's way, I should feel I would be starting the case at a decided mental disadvantage and that I should be starting the case at a decided disadvantage before any fair-minded persons who are going to be the triers of the fact.

May I say this to your Honor, Mr. Pike mentioned that one of his concerns in this case was that witnesses had been subpoenaed. Of course I know—I have a very high regard for Mr. Pike—which con-

cerns him most, whether witnesses be discommoded or injustice be done to a man, Mr. Pike unhesitatingly would say his greater concern would be that a man have a fair trial than that a witness come over or the government maybe take the trouble to telephone and say, "Instead of answering that subpoena for such and such a date, you will have to answer it for such and such a date."

Mr. Campbell mentioned the affidavit set forth the number of attorneys and two accountants for whom powers of attorney had been given. I might state this to your Honor. Within my knowledge there were in all three attorneys until Mr. Blakey and Mr. Lohse appeared, who have ever taken any part since this investigation was set in motion. That was Mr. Hurley of New York, Mr. Golden and myself, and I can say to your Honor that the reason for giving powers of attorney at these various points, such as attorneys in Nevada, Washington, and so on, was because of the facts of the case, because of the lack of funds on the defendant's part to be able to ship attorneys all over the country because the case was in Nevada and there was the necessity of going to Washington, D. C., and there were arrangements made for attorneys to appear, but they never took an active part. There were only three attorneys until Mr. Blakey coming into the picture and now Mr. Lohse, under the file requiring a local ~~co~~ ~~sel~~, who took an active part, and I might state to your Honor on the occasion of my trip to Washington in February, that I was then actually in Washington, D. C., on another income

tax matter and I, so to speak, gave Mr. Remmer the benefit of my feeble efforts, which proved to be very feeble, in the conference which was held in Washington, D. C.

Now there is another observation I would like to make in connection with something that was said by Mr. Campbell, and that is this—Mr. Campbell advises your Honor of something with which your Honor was undoubtedly familiar before, advises your Honor that it is the concern of the Commissioner that when he has good reason to believe that a taxpayer still owes money to the government and when there are available and in sight belonging to that taxpayer, and when there is the fear that arises in his mind that the taxpayer might dissipate those funds that rightfully should go to pay his taxes, that then in that event, as an administrative matter, under the law, he may direct that arbitrary assessment, government lien, be placed upon that property. For why? For the reason that he wants to preserve that property to make it available for taxes should it ultimately develop more taxes are due the government, and that is fair enough. Then Mr. Campbell said in this instance, when Mr. Remmer wanted to withdraw some of his funds, even though he was willing and in a position to put up by surety bond, corporate surety bond to insure the government against losing a dime of whatever part of the liquid assets they released, cash they released, he said the Commissioner wanted to know, did Mr. Remmer really need the money, the defendant? Might he have some other assets? Did he

really need the money? Of course, it must be obvious to your Honor that the only concern at that point of the Commissioner was, "I have in my possession, or at least under lien, subject to any taxes that may develop, these assets to make that assessment. Now if in substitution thereof I have a corporate surety bond which assures the government, which is the same as money only in another name, that should be my concern, and not my concern whether Mr. Remmer is being prudent about how he spends his money for counsel fees or accountancy fees.

I want to say one other thing, your Honor. I discussed this with my associate and I did not know a point was going to be made this morning and therefore I am not prepared with affidavit on the point. Mr. Campbell mentioned the fact that considerable time ago there was made available, not the records that we are concerned with, but some of the records, to a Mr. Friedman, who was for a brief period of time an accountant. Well, if your Honor will receive it, I can only tell you this, that Mr. Friedman did engage in certain conferences and did set about to make an analysis and did require some money for his services, which we were unable to pay, and did move out of the case and pass into the limbo of those others who were named in powers of attorney but failed to take any active part. Now it is my information, may it please the Court, from my associate—and I say this is not a matter under the oath and dignity of an affidavit, because I did not know a point was going to be made of it—

it is my information from my associate—if your Honor wishes an affidavit, I am sure I can obtain one as quickly as I can get one from San Francisco—that Mr. Golden and Mr. Friedman did hold conferences with government officials at any early stage in this case and that it developed that the government had quite an abundance of records and that the accountant and attorneys were told that those records would be made available to them for their inspection. This is my information from my association, that Mr. Friedman and one of his men went down to the government office and it is my information that they did not spend any time at all, not a week or several days, but according to my associate, in very short order—as a matter of fact, after perhaps half a day, as I get the information—Mr. Friedman returned to Mr. Golden and told Mr. Golden that there was such a mass of stuff dissembled, in such bad form, that it would take several of Mr. Friedman's men and himself a considerable period of time to sort out the stuff and get it in shape to be able to examine it and know what it might mean, and that that would take considerable time and amount to considerable expense and Mr. Friedman did not feel he would be able to undertake even examining into those documents without a substantial payment, and he pointed out to Mr. Golden, where he was willing to be more or less generous with his own personal time, although he wanted to be paid for his services, still in regard to junior accountants he employed, he had to meet pay rolls for them and he couldn't undertake such

a monumental job without having a substantial retainer to go over those things, and that is the information in my hands from my associate regarding that incident that Mr. Campbell referred to.

Now may it please the Court, you have been very indulgent with us and I submit the matter.

The Court: I have a recollection of the hearing June 15th in Carson City on motion for bill of particulars. I think at the conclusion of that hearing the Court suggested that counsel confer with Mr. Golden and Mr. Pike and the suggestion was made that certain information be furnished Mr. Golden at that time and I also recollect that the Court at the time, in the event Mr. Golden did not receive the cooperation from Mr. Pike that the Court indicated that should be given, he could apply to the Court later. Now no application of that kind has been made in relation to those proceedings June 15th. Now am I to understand from what we have heard here today all of the records, which are the subject matter of the present motion to inspect, were at some time given to Mr. Friedman or made available to him for inspection?

Mr. Campbell: That is my understanding.

Mr. Gillen: I do not know about all of the records. I will put it this way—there is no question that there was a substantial amount of records in Mr. Campbell's office, or some adjacent office, shown to Mr. Friedman, but Mr. Friedman, as I told your Honor, reported that it would be so expensive to do he could not do it and at that time there was request made for the release of \$35,000, to be pro-

tected by bonds, so we might spend that money for that very purpose.

Mr. Campbell: I might state my understanding is among those records shown Mr. Friedman on that occasion were those which were since subsequently delivered to Mr. Semenza.

Mr. Gillen: Some of them were. May I ask your Honor to keep this in mind, as indicated in Mr. Avakian's affidavit and letter, that it was not until October of 1951 that Mr. Avakian came up here on the 18th and 19th with Mr. Golden and had consultation with Mr. Semenza, that Mr. Avakian and Mr. Golden were made acquainted with the fact that Mr. Semenza was not in position, or had not had an opportunity to see certain records and that he could not make a complete analysis without those and that was the time that Mr. Avakian immediately, upon his return to his office on the 20th of October, appealed to Mr. Campbell to afford us an opportunity to make an examination of those records.

The Court: Now am I also to understand that the matter of releasing assets and accepting surety bond for the funds released, am I to understand that this is an administrative matter, to be determined by the Commissioner of Internal Revenue?

Mr. Campbell: That is correct, your Honor.

The Court: So the ruling concerned with that question, there is not an application to this Court for order requiring the Commissioner to release assets. The only reference to that failure to have

assets released is to show cause why delay has been had in this matter.

Mr. Gillen: To show our diligence, your Honor, and to show the reason for our present predicament.

The Court: Now, of course, I feel the Court would have no power to make such order. That is a matter of discretion and perhaps could not be subject to review under administrative act.

Mr. Gillen: I think it would be subject to review in appellate proceeding.

The Court: It may be, but here suppose a motion of this kind, Notice of Motion to Inspect and Take Copies, if that motion had been made prior to the time Mr. Friedman entered into the picture, these subsequent funds would amount to a full compliance with an order of the Court granting that motion. The defendant has had all the benefits that the Court could give, the benefit by an order under Rule 16.

Mr. Gillen: No, I do not think so, your Honor, because of this, your Honor—although we know that there was a bundle of records, we do not know that those records contain these particular records which Mr. Semenza needs.

The Court: An examination of that bundle of records were made available to his auditor or counsel. Of course, what took place between the auditor or the accountant and defendant and counsel, can not seem to be chargeable to the government or go to show that the government had not been considerate of the defendant's rights.

Mr. Gillen: Well, as to these new records, as

your Honor is informed by the affidavits, Mr. Semenza advised Mr. Avakian and Mr. Golden that those records had not been made available to him, concerning some number of business enterprises in which Mr. Remmer is supposed to have a partnership. We do not know what those are.

The Court: If there had been refusal on the part of the government to allow inspection under Rule 16, I would be inclined to feel—

Mr. Gillen: May I respectfully say there has been a refusal.

The Court: I can not see it that way. I think when the accountant Friedman was given access to these records under Rule 16, that takes care of that situation.

Mr. Gillen: I do not think so, your Honor, for this reason, if I may respectfully say so—we do not know, and we suspect, that these are not records that were contained among the records that were made available to Mr. Friedman.

The Court: All right, take it from this view then. I think it is admitted—the Court at least had heard enough here, to authorize the Court to consider that Mr. Friedman had access to these records. Now something happened. He found them in an involved state of confusion, going to require some money, some time, to analyze those records. That was a long time ago.

Mr. Gillen: That is right, your Honor.

The Court: Then why wasn't the motion that was filed on the 14th of November filed at that time?

Mr. Gillen: I will tell you why, your Honor.

Because, as indicated by Mr. Avakian's letter and Mr. Avakian's affidavit, he said, "it was just brought to my attention that the Government has certain records which we have never seen and which our accountant has never seen and therefore, Mr. Campbell, we are asking you to make those records available for inspection."

The Court: We have no showing of the poverty of this defendant except by relaying. All we have is what he told counsel.

Mr. Gillen: You have the oath of Mr. Golden in his affidavit.

The Court: Mr. Golden tells us what Mr. Remmer told him.

Mr. Gillen: Mr. Golden tells you he received no money.

The Court: That does not show us that Mr. Remmer may not have assets to take care of funds. There is no substantial showing here from which the Court would be authorized to say Mr. Remmer is destitute.

Mr. Gillen: Well, the question is now—

The Court (Interceding): This situation could go on forever. It may be some present counsel acting for Mr. Remmer would be tired of serving.

Mr. Gillen: I have never walked out on a client in 24 years of practice.

The Court: The motion for continuance is denied and motion for inspection is denied and the case will be held on the 28th of November, 1951, at Carson City as set.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes in the case entitled, United States of America vs. Elmer F. Remmer, No. 12,177, at the Hearing on Motion for Continuance and Motion to Inspect Records, held in Las Vegas, Nevada, on Thursday, the 15th of November, 1951, and that the foregoing pages, numbered 1 to 42, inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, November 19, 1951.

/s/ **MARIE D. MCINTYRE,**
Official Reporter.

[Endorsed]: Filed November 26, 1951.

[Title of District Court and Cause.]

**DEFENDANT'S CHALLENGE FOR CAUSE TO
JUROR JOHN W. HUMPHREY**

November 28, 1951—Carson City, Nevada

John W. Humphrey, Reno, Nevada, employed by Sierra Pacific Power Company, having been drawn as a prospective juror, was questioned by the Court generally and specifically, as follows:

The Court: Now, ladies and gentlemen, you have heard a statement of the nature of this case. Have any of you heard anything other than the statement of this case; in other words, do you know anything about this case? Have you heard any one discuss this case with you? I want to be sure you understand this question. Have any of you heard about this case before you came into court today?

Mr. Humphrey: I have read it in the paper.

Q. (By the Court): Did what you read amount to any more than what you have heard in this statement? A. No, just about the same.

Q. Anything you read, did it leave with you an impression as to whether or not the charge was true, or any opinion as to whether the charge was true?

A. I am afraid I did form an opinion.

Q. You formed an opinion in the case from just what you read in the papers? A. Yes.

Q. That is all you know about the case?

A. Yes, sir.

Q. Have you discussed the case with any one who knew anything of the facts? A. No, sir.

Q. Have you any idea what the evidence in this case will be? A. No, I do not.

Q. All you know is that the defendant is charged with this offense? A. Yes, sir.

The Court: Any one else here who has read about the case? I suppose several of you have, but the mere reading about this case, has that left with you an opinion as to the guilt or innocence of the defendant?

Juror Coletti: I have heard gamblers at my bar.

The Court: Did they claim to know anything about the evidence?

A. (Mr. Coletti): They thought they did. I don't know whether they did or not.

Q. And the conversation that you had with gamblers has left an impression on you, or an opinion one way or another?

Mr. Coletti: Yes, sir.

The Court: It would be difficult then for you to sit in this case and listen to this evidence and free your mind from the opinion or impression you gained in your conversations with other people?

Mr. Coletti: I don't know.

The Court: From what you have heard, if you were asked to give a decision, could you give a decision one way or another at this time?

Mr. Coletti: Well, from what I have heard, I think I could.

The Court: Any objection to excusing this juror?

Mr. Thompson: We have no objection, your Honor.

The Court: Any challenges for cause?

Mr. Lohse: Your Honor, the defense has no objection to the excusing of either Mr. Hillygus or Mr. Humphrey.

After further questioning of other jurors:

Mr. Lohse: At this time I thought your Honor was going to pursue the questioning of the prospective juror, J. W. Humphrey.

The Court: Just let me proceed here.

* * *

Mr. Lohse: Your Honor please, on behalf of the defendant, may I challenge one of the jurors?

The Court: Wait a minute. I want to know if you have any further questions to suggest.

* * *

The Court: Any challenge for cause?

Mr. Lohse: Your Honor please, at this time we will challenge the juror Humphrey for cause. If the Court please, Mr. Humphrey expressed the opinion that he was prejudiced against gamblers particularly.

The Court: I did not hear him say so.

Mr. Lohse: I believe he did.

The Court: You did not make any such statement?

Mr. Humphrey: Not at all.

Mr. Lohse: I understood so. Perhaps it was erroneous.

The Court: Well, he did not.

Mr. Lohse: I thought he expressed an opinion he would not be able to fairly judge the defendant because—

Mr. Humphrey: I said I might, because of the occupation—

The Court (Interceding): You have heard what we tried to explain about duties of jurors. You would not find a man guilty unless you believed him guilty beyond a reasonable doubt?

Mr. Humphrey: I would not.

The Court: And you wouldn't find him guilty

of the offense charged because he worked some place you didn't think a good place to work?

Mr. Humphrey: No.

The Court: The challenge is denied.

Mr. Lohse: We note an exception, your Honor.

The Court: Yes.

State of Nevada,
County of Clark—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had at the drawing of the jury in case No. 12,177, entitled, United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, in Carson City, Nevada, November 28, 1951, and that the foregoing pages, numbered 1 to 5, inclusive, comprise a full, true and correct transcript of that portion of my notes relating to the prospective juror, John W. Humphrey, to the best of my knowledge and ability.

Dated at Las Vegas, Nevada, April 3, 1952.

/s/ MARIE D. MCINTYRE,
Official Reporter.

[Endorsed]: Filed April 18, 1952.

[Title of District Court and Cause.]

December 11, 1951, 10:00 A.M.

HEARING OF CONTEMPT OF COURT OF
DAVID N. KESSEL AND WALTER M.
PECHART

(In the Absence of the Jury.)

Present: Walter M. Campbell, Jr., Esq., Miles N. Pike, Esq., Bruce R. Thompson, Esq., Attorneys for Plaintiff.

Charles J. Wiseman, Esq., Joseph P. Haller, Esq., Attorneys for David N. Kessel and Walter M. Pechart.

David N. Kessel and Walter M. Pechart.

The Court: We have two matters to consider this morning before we proceed with the trial. Mr. Kessel was called as a witness yesterday and I want to be sure that we understand the state of the record. The question propounded to Mr. Kessel was "Do you know Mr. Remmer's occupation?"

Mr. Campbell: That is correct, your Honor.

The Court: And the witness refused to answer the question and was ordered by the Court to answer the question, for the reason that it appeared to the Court that a response to the question would not present a reasonable danger of incrimination of the witness.

In regard to the witness Pechart, the question was asked, as I recollect it—I want to be sure that

I have the right understanding—the record here shows the situation as I think we have stated in regard to the witness Kessel—Monday morning, May 10, 1951, the question:

“Do you know Mr. Remmer’s occupation?

“A. I refuse to answer the question.

“Q. Upon what ground?

“A. Tend to incriminate me.

“Mr. Campbell: I press the question.

“The Court: Well, you will be detained until tomorrow morning at 10:00 o’clock. You are committed to the custody of the marshal and you have counsel and in the meantime you may consult counsel. You will have a hearing tomorrow morning at 10:00 o’clock on your refusal to answer. You are now committed to the custody of the marshal.”

So I think probably it would be well to take these cases individually.

Mr. Wiseman: Yes, your Honor.

The Court: The legal argument, I presume, would perhaps be the same.

Mr. Wiseman: It would apply to both, your Honor.

The Court: The present impression I have is, and I would like to be informed on the question fully, of course, that the privileges invoked here is to protect against possible prosecution or incrimination of an offense defined by the State law, not federal law. The question which Mr. Kessel refused to answer: “Do you know Mr. Remmer’s

occupation? A. I refuse to answer the question," do you contend that that has to do with the federal law?

Mr. Wiseman: Yes, your Honor.

The Court: What federal law?

Mr. Wiseman: If I may be permitted to explain.

The Court: Yes, I would like to know what your position is because if we could agree on some of the principles it would save some time.

Mr. Wiseman: I very respectfully might say to your Honor that in the opinion of counsel there was no contempt of any order your Honor made yesterday. I think the record will sustain there was no order in the record given to the witness Kessel to answer the question and respectfully I submit to your Honor he was not in contempt yesterday or at this time of any direction of the Court.

It is not, as your Honor suggested, that a question that may, upon the face of it disclose a possible offense against a State law is the grounds upon which this witness invoked his constitutional right against self-incrimination. Now preliminarily, your Honor, a witness—and I think it should be conceded—is entitled to invoke his constitutional right against self-incrimination at any time or upon any occasion and upon any court. Now in order for the Court—and I think the authorities sustain the statement—in order for the Court to pass upon the question as to whether or not the privileges may be exercised, the Court may inquire, and should inquire, into the grounds, so that you, in determina-

tion of whether or not he should or should not answer the question, can thereupon pass upon it.

Now in this connection, your Honor, if you recall, the witness Kessel, when called upon as a witness in this action, asked your Honor the opportunity to make a statement. Your Honor at that time directed him to answer the question and then he exercised his privilege against answering the question upon the ground that it would self-incriminate him. Now, your Honor, and we expect and represent to you, the witness would have advised this Court that at the present time he is under indictment in the United States Federal court for the Northern District of California. I would expect, your Honor, that he would have told you at that time that that indictment, upon which he is standing trial on the 7th day of January, 1952, in the United States Federal court for the Northern District of California in San Francisco, is based upon a violation of two United States Code, Section 192, the same being a contempt of the United States Senate. I would expect, your Honor, that he would have handed you at that time, so that you could have passed upon the proposition as to whether or not he was invoking his constitutional privilege, not because of a violation of a State law, but for a fear, or a tendency toward a fear, that any answer he might give to you here would incriminate him and privilege his rights under this indictment.

Now, your Honor, this indictment would show that the witness Kessel was called before the sub-committee in what is commonly known as the Ke-

fauver hearing and upon that hearing, your Honor, exercised his constitutional privilege against self-incrimination, refused to answer certain questions of the committee, thereafter an indictment was returned, and insofar as the witness Kessel is concerned, there are some 28 counts in this indictment which relate for failure to answer certain questions propounded by that committee.

Now, then, your Honor, in order to determine in respect to the witness Kessel as to the relevancy of any question or the materiality of any question asked him upon this trial, you would have to have, it seems to me, before you the indictment, you would have to have before you, with respect to the indictment, the various questions asked the witness Kessel by the sub-committee and upon which he is under indictment and upon which he stands trial on January 7th. Now in connection with that matter, your Honor, a question which is propounded to this witness upon this trial, which appears upon the surface to be an innocuous question, if we may use that expression, might become a very material question, insofar as his constitutional rights are concerned with respect to the questions upon which he now stands upon indictment.

Now then, your Honor, the proposition is still not as simple as that. In connection with this indictment, your Honor, and the number of counts—and the counts, I say, are concise, they simply consist of questions and refusal of the witness to answer—you must, it seems to me, your Honor, to further

pass upon the materiality of these questions, have the transcript of that testimony which contains other questions which relate to the question propounded to the witness Kessel. Now, your Honor, the indictment, as I say, contains some 28 counts, can be simplified briefly—and I think I make a fair statement to the Court because I am going to hand these to your Honor—the Kessel indictment, the questions related to his business, your Honor, to his business associates, to his knowledge of certain persons and parties, but above and beyond that, your Honor, the questions propounded by that committee with respect to the witness Kessel related to his income tax problems and questions related to whether or not, I believe in counts 20 to 25 or so, related to this question. He was entirely examined with respect to his income tax returns, whether he had ever filed them, whether he had ever been checked by the Internal Revenue Department, whether any penalties had ever been assessed against him, not simply, your Honor, inquiring whether he did or did not know a certain man, but for the purpose of bringing into the answer to those questions any material relating to his income tax problems.

Now, your Honor, I would further expect the witness Kessel, had he been so permitted at the inception of this trial, to have told you further he was under investigation by the Internal Revenue Department for some past year, further that he would have told you that he has been consulted, that accountants have been in communication with ac-

countants for the Internal and Treasury Departments, that his attorneys have been in conference with them with respect to his income tax returns. Those matters I mention so you may determine whether or not a question, which you would be entitled to consider as being non-incriminating, is in fact incriminating, because the defendant Kessel is now in this position, Judge, he is about to stand trial in federal court on January 7th for failure to answer questions which relate to his business, to his business associates, to his income tax problems, all for the purpose, your Honor, of preserving his constitutional rights against self-incrimination. In other words, he is indicted, he is under indictment because he invoked his constitutional rights, he is now in that analogous position—he comes before this Court, a question is addressed to him, in the absence of your Honor having any knowledge of these things, which I assume you have not up to the present moment, and a question which is innocent on its face, is presented to him, he exercises, in his judgment, his constitutional rights of self-incrimination, and your Honor, having nothing before you except the naked question, not knowing the grounds on which he fears any answer he might give may incriminate, even in respect to the indictment, but above and beyond that in respect to any investigation by the Treasury Department, your Honor can see, in the absence of this information or the grounds upon which he exercises his privilege to an innocent question, would conclude that it is not self-incriminating.

Now, your Honor, it has been suggested to you—not suggested, but the statement has been made—that this relates to State law. Judge, if you took the indictment, if you are satisfied this man is standing trial within three or four weeks upon the very matters, upon the very questions that are being pressed by counsel at this time, I think your Honor would understand just in a consistent position he would have to exercise his constitutional privilege before you at this time. Let me suggest this to your Honor—he in good faith, and let us say upon advice of counsel, before the sub-committee hearing exercised his constitutional privilege against self-incrimination. Whether he was right or wrong will be determined upon the trial of that case. Now we come before you upon this hearing as a witness for the government in this matter, and a question is asked. Let us assume one of two things now, that he either voluntarily answers the question, he is then in the position of having taken a position before the committee on a refusal to answer and before you here of having voluntarily waived that privilege, so that it will then be said that he should not have exercised and had no right to exercise or grounds to exercise his privilege before that committee. Now take the other part of the matter, your Honor. Assume then, for the purpose of this argument, that a question is addressed to him, assume then that a question, innocent upon its face, is put to him here and your Honor, in the absence of this other information—which I know you have not had up to the present moment—directs

that witness to answer. Well, it just occurs to me and seems to me, your Honor, that there is then a determination by this district court of the very issue which will be presented to the court before a jury on the 7th of January in San Francisco. In other words, there is a determination by your Honor, unless you have all these material facts before you, that a question asked the witness in San Francisco, upon which he stood his constitutional grounds against self-incrimination, is presented again to the witness here and he is directed and ordered to answer, it is a determination—at least I fear it is a determination—by this court that the question that was asked him in San Francisco, upon which he stood his grounds by that exercise that he should have answered the question and consequently is in contempt of court.

Now, your Honor, in connection with the situation, I feel satisfied, your Honor, it is an unusual situation, in which a witness is under indictment for failure to answer specific questions. Now it seems to me, your Honor, in addition to that and explanatory of that hearing, I would expect, as I told you before, that this witness would have told you, and will tell you, that he is under investigation by the Treasury Department; there have been these conferences between his lawyers and attorneys, all of which furnish a ground upon which he fears that any answer that he might give you here will be self-incriminating. Now the only way that matter can be presented to the Court, and your Honor is justified in inquiring into, is grounds to ascertain if the

fear he tells you is well-founded. In other words, unless your Honor knows that, simply because an innocent question is presented to the witness and simply because he refuses to answer that question, your Honor would be justified, in the absence of any knowledge of those fears that a man has, to direct and order him to answer that question.

Now, your Honor, with respect to the factual background, I think I have given it to you. I have these indictments here, your Honor. They are easy to read, they can be read in five minutes, your Honor can see the questions. Every question in fact, irrespective of whether or not it is in itself a direct question as to whether or not the man is guilty of a crime, such as "Did you commit the murder," it is not that question, but it is an innocent question, your Honor, which ties in and relates to other questions of importance in this indictment, with respect to this man's personal income tax problem, augmented, your Honor, and expanded by other questions which appear in the transcript of the hearing before the committee, which I have here, which explain in a large measure, or amplify, a question upon which this witness refused to answer.

Now, your Honor, with respect to the legal proposition, I do not think any of us are in dispute. I think, your Honor, with respect to a witness' position under these circumstances, he is entitled, in the absence of a stipulation, and he has, to exercise his privilege with respect to every question asked, particularly under these circumstances. I can well

appreciate that if a question is asked the witness and each time the witness has to repeat a lengthy statement or state his grounds and every time your Honor has to consider the question and either make an order or direction to answer the question and thereupon the question is answered, I can well understand, your Honor, that that interferes with the orderly progress of this trial, but there is no way, your Honor, that this witness can protect his rights unless to every question asked him he exercises his privilege and the Court considers the materiality of the question and either permits him to decline to answer or orders him to answer. Now that, your Honor, it seems to me is the simple procedure and a stipulation certainly would eliminate it if we deem to every question asked him that he makes that answer.

Now, your Honor, with respect to authorities, I know the Court is thoroughly familiar with the law in this matter.

The Court: You do not need to assume that.

Mr. Wiseman: Let me say this, your Honor, I think we are in accord with this, that a witness, presumably any witness, is entitled to exercise his constitutional right in court. Now that constitutional right, your Honor, should be preserved, and will be preserved, if the facts are known to the Court upon which the Court would base its ruling. Now in respect to Kessel, I think I have indicated to you that he has more than reasonable fears against self-incrimination with respect to any ques-

tion, based upon, your Honor, the indictment, based upon the transcript of the testimony before the committee, and further based upon the investigation of his activities with respect to his income tax problems over the past years.

Now your Honor recently—and these matters are coming before the courts more often in the last year—recently the Supreme Court of the United States, in Hoffman vs. United States, Supreme Court 814, decided May 29, 1951, in respect to this very point, your Honor, and I just want to read your Honor four or five lines in respect to his right:

“To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it can not be answered might be dangerous because injurious disclosure would result.”

Now the injurious disclosure would result, your Honor, in practically having this court determine that questions asked this witness before the committee in San Francisco were proper questions and that consequently, your Honor, he is in contempt of the Senate Committee. In other words, there would be a determination, a practical determination at least, that the question that was asked him in San Francisco was not a question upon which he could invoke his constitutional privilege, because it had been determined by this Court in Nevada that the

question was not such that he could invoke the right of self-incrimination.

Now, your Honor, conceding now that the witness in question should feel that a disclosure would be injurious, and certainly upon this record has indicated it would be, I would call your Honor's attention to *Estes v. Potter*, Fifth Circuit, 183 Fed. (2), page 865, which, in my judgment, expresses the rule as clearly and concisely as any case I have been able to run across, and that case, your Honor, dealt with the very problem that now confronts you. In other words, your Honor, what we have here is a series of apparently innocent questions. The questions presumably relate only to such facts, consequently the privilege could not be invoked with respect to such facts, and I think that is departure, that is contrarywise to what the actual facts of this case were. Now in the *Estes* case, they considered the question, they did not consider the question as I suggested: "Did you rob a bank," but they were considering questions which formed a link and which all put together produced a charge of some nature against the defendant. Now the Court, dealing with that very problem of the question and answer, said:

"A witness need only show that his answers are likely to be dangerous to him. If in the circumstances it is reasonable to infer the possibility of incrimination from the answers that the witness may give, the privilege may be claimed."

Now just at that point may I stop, your Honor, and ask, in fairness of counsel for the prosecution, that after we have shown to you the indictment, which contains the very question that this witness was asked, isn't it, in fairness to state, Judge, that the very questions being asked this witness relate to that indictment. Answers to those, your Honor, would be a determination as to whether or not he was or was not guilty of contempt before that committee.

I am reading, your Honor, from page 868 of the report. Now this is the problem your Honor now has:

“It is for the court to determine, in the first instance * * *”

and that is primarily your question:

“It is for the court to determine, in the first instance, whether incrimination is reasonably possible from any answer the witness may give; but if such possibility exists, then the witness has the absolute right to assert his privilege, which extends to more than the admission of a crime or any element thereof. The privilege bars compulsory disclosure of any fact that tends to incriminate the witness.”

and citing authorities, *Counselman v. Hitchcock*, the leading case in contempt in the United States and has been, your Honor, for 75 years.

Now I want to call your Honor's attention likewise to *Rogers v. United States*, decided in the

Tenth Circuit, 179 Federal (2), page 559, reading from page 562, when the court said, keeping in mind the Estes case and absolute right of the witness there given; and this, your Honor, I think is an answer to the innocent question upon its face:

"Furthermore, a witness may not be required to give an answer which furnishes a link in a chain which would enable the Government to obtain the facts showing his guilt of a crime. It is also clear, from all the cases, that a witness may not refuse to answer because his answer might tend to incriminate others."

Now, your Honor, with respect to the link in the chain, that is the very problem this Court has to decide with respect to each and every particular question asked this witness.

Now, your Honor, there is one other case, and I am not going to read any further on the law, because I think the law is clear on the thing: Kasinowitz v. United States. This is the Ninth Circuit, your Honor, 181 Fed. (2), 632, and I believe this was Justice Holmes' decision, I am not positive about it. This, your Honor, is at page 637 from the Ninth Circuit. I am addressing myself to the question I am designating as an innocent appearing question. At page 637 the Court said:

"The question which the witness may refuse to answer need not of itself require his admission of the commission of a crime, otherwise, as stated in United States v. Weisman, 111 F.

2d at page 262, the witness 'will be forced to disclose those very facts which the privilege protects.' "

Now, your Honor, I am just going to cite two other cases, Alexander v. United States, 181 Fed. (2), 480 and another, Doran v. United States, 181 Fed (2), 489.

Now I think, your Honor, there is no dispute about the legal proposition; in other words, the witness' absolute right to exercise his privilege. There is no question in the first instance it is the duty of the Court to make determination from the facts brought to the Court's attention and knowledge. There is no question, your Honor, that a simple, innocent appearing question may still give the witness the right to exercise his privilege if it follows a link in a chain which might or might not tend to establish a crime.

Now in conclusion, your Honor, let me state this, there is no dispute, your Honor, and I think counsel will concede, that both of these witnesses are under indictment in San Francisco in federal court for failure to answer questions which are set forth in these indictments. I think further, your Honor, that we concede that they go to trial on the 7th of January; that the questions that are asked this witness in respect to his business—because I briefly summarize both of these indictments, they relate to his business—business activities and his income tax problems, the very purpose of business questions was to bring into the income tax questions the source

of his business, the witness is going to trial on the very questions, your Honor, relating to his business, his associates, his knowledge of persons and associates, going to trial, your Honor, further with respect to failure to answer questions in respect to income tax problems. These questions are being addressed to him and, your Honor, if he voluntarily answers the questions, he is put in the position of having admitted before this Court that the privilege exercised by him in San Francisco was without ground and without merit, and if your Honor orders him to answer the question, then I say to your Honor that you are determining the question asked the witness in San Francisco was a proper question, that the witness had no right to exercise his privilege, that he was in contempt of the committee at the time and is a determination of the fact which this witness is, under the law, permitted to have submitted to a jury for determination because automatically, your Honor, in this matter he is entitled to have a trial by jury for failure to answer the question. Further than that, as I say, this witness would expect, and I would say, that he would tell you of the investigation made, all of which creates a fear in his mind, your Honor, that any question asked him will be self-incriminating and tend to establish some sort of charge of which he is not informed, although he reasonably fears it will relate to a violation of our Internal Revenue income tax law.

Now, your Honor, I am going to submit to your Honor the indictment and I mention that the trans-

script of the California hearings which further explain this, I can say to your Honor relates only to the particular 10 or 15 pages of this which I have marked, and if from these matters, your Honor, it appears he has a fear, facing this indictment that he is about to go to trial on, relating to business or income tax returns, I say it is reasonable and a material one, in which he is entitled to invoke his constitutional privilege.

In respect to Mr. Pechart, I submit that Mr. Pechart's position is the same substantially as Mr. Kessel's, that he was not in defiance or contempt of any order of your Honor yesterday, that he stands before you today in the same position as he was originally here before the court, as a witness, and that he did not violate any order yesterday, because the record is free from that.

The Court: Now I would like to ask you a question. Do you agree, Mr. Wiseman, that the provision of the Fifth Amendment, "shall not be compelled in any criminal case to be a witness against himself" applies only to a federal crime and not a State crime?

Mr. Wiseman: I would concede that, your Honor.

The Court: Now I do not recall of ever hearing of a situation just like the one we have here. This is just a matter of conflicting proceedings for contempt. The purpose of the indictment in San Francisco, which you have mentioned is a charge that the witness was in contempt of the Senate Committee. Now if we would be justified in postponing

the trial of this case until the conclusion of the trial in San Francisco—what I have in mind is this—are we required—put it that way—to postpone the trial of this case until the litigation in San Francisco is completed? We have no idea what the result of that trial will be, but suppose that trial, in effect, amounted to a question that such a question as this would have to be answered: "Do you know Mr. Remmer's occupation?" are we required to stand by and postpone this trial until that court in California decides that this question could be answered? Well, let us look at it from another point of view. It could happen, where people are closely related in business, that a number of trials of this same nature, perhaps on facts somewhat similar, could be in progress at the same time in different jurisdictions or before different tribunals or district courts in the same district, and then when a witness, who would be a material witness in each of those cases, was called and this situation arose, would the Court then, having his presence before it on the witness stand, be required to stand by and await the determination of other proceedings for contempt? You have not cited any case—I have not heard of any case—that embodies such a situation as we have here, none at all. Isn't that true?

Mr. Wiseman: As far as I know, Judge, it is a novel question.

The Court: The case in California is merely a contempt proceeding, that is all it is. The indictment is required by the statute to bring the matter

before the Court to determine whether or not the witness was guilty of contempt or committed contempt of the Senate Committee. You have the same situation, the same witness, to determine here now whether he must answer this question. That is what I understand we are trying to determine this morning, whether he must answer this question. If the Court determines that he must, then he will be given an opportunity to answer it before the jury. Now I just want to give you some of the thoughts I have running through my mind and I hope what I have said does not disturb any line of argument that counsel has planned here.

I would like to hear further from you.

Mr. Wiseman: Judge, in regard to that may I say this, as an officer of the court. There is upon the part of these witnesses certainly no intention, on advice of their counsel, to be contemptuous of this court in respect to any order that you might make. I think frankly, Judge, there was a misunderstanding yesterday in respect to the manner in which the privilege was exercised by these witnesses. In other words, Judge, they are put before you in this position, where they have to exercise their privilege with respect to every question. They are not questions that have no relation at all, as "What suit did you wear last Sunday?," I don't mean questions of that kind, but with respect to any question with relation to any fear, or assumed fear—and your Honor keep in mind it is not only limited to this indictment, but it is as I told you, that these witnesses, I would expect to tell you, are un-

der investigation and I think that fact would be conceded by the prosecution, that there has been an investigation and is at present an investigation, that that itself, independently of the indictment, would furnish some grounds upon which you could determine, as you can, the question whether or not a question is or is not material and should or should not be answered. But I say there should be some orderly procedure so the examination of the witness should not become such as to make the jury and your Honor impatient, but your Honor, I think it should be conceded they have a right to exercise their privilege to every question. It is not done for the purpose of harassing or interfering with the progress of this trial because their problems are as important to them as to the defendant or the prosecution in this case. In other words, if they have constitutional privilege as citizens, they have the same right to exercise it as the defendant or any member of the prosecution. So I say, Judge, anticipating the further progress of this trial, that neither the witnesses nor their counsel want to be put in the position before your Honor of even indicating that they desire to be in contempt of any order you may make. In other words, I feel any order you make would be in the exercise of your best judgment and not presuming that these witnesses would be in contempt of any order you make, but I say they are entitled to exercise their privilege. Now there is a method of doing it, which may or may not impress you, but ultimately, your Honor, the privi-

lege simply relates to their fear of self-incrimination.

The Court: I think we understand we have to meet these things as they arise. No matter if it interferes with the progress of the trial, we must go along and rule on each question. Now the question before us here is simply this, on the part of Mr. Kessel, "Do you know Mr. Remmer's occupation?" That is all we have to consider here.

Mr. Wiseman: I know, regardless of how it arose, your Honor will consider as to the facts before you and make your determination as to the materiality of that question. Thank you, your Honor.

The Court: The only point I am considering or deemed we had here now is this question of this being a matter involving a crime by virtue of this indictment. Maybe that is a crude way of putting it—you understand what I mean.

Mr. Wiseman: Of course, anything that might be fear might be seized upon as charge for violating against income tax.

Mr. Campbell: I take it our present argument, of course, is addressed to the last question. However—

The Court (Interceding): Well, I tell you about that last question. He is going to be ordered to answer this question, but I thought while we had the jury absent we might discuss some questions of law which would be helpful as we go along with the trial. The pleading of privilege under the Fifth Amendment seems fallacious to me under a question

of this kind—"Do you know Mr. Remmer's occupation?"

Mr. Wiseman: Yes, your Honor, it is a link in a chain of questions.

Mr. Campbell: I understood the argument was to be used as a guide post throughout the examination of these witnesses.

The Court: Yes.

Mr. Campbell: Now, as I understand counsel's argument, he makes two principal points—first, that the witnesses Pechart and Kessel are presently under indictment in the United States District Court at San Francisco for failing to answer certain questions before the committee to investigate organized crime, Interstate Commerce Commission, known as the Kefauver Committee, and, secondly, the contention is that they are presently under investigation with regard to their individual tax matters—

The Court: I am going to interrupt you a moment. I am going to call the jury in and excuse them until 1:30.

(Jury and alternate jurors returned into court at 10:55, admonished and excused until 2:00 o'clock.)

Mr. Campbell (Continuing): As I stated to your Honor, counsel made two principal points; first, as to the indictment presently pending in San Francisco, and, secondly, as to an investigation of the income tax affairs of the two witnesses, which he states is presently under way.

It would seem a strange situation if, by having refused to answer certain questions before a Senate Committee and then subsequently being either under indictment or under fear of indictment of having committed contempt against the Senate, that the witnesses could, through a claim of immunity upon those points, make their testimony, which would be material and pertinent in collateral cases, to which they were not even parties, a matter beyond the reach of the contending parties in such proceeding, which is in effect what Mr. Wiseman's contention is here.

Referring very briefly to the indictment pending in San Francisco, to the indictment against Mr. Kessel, which is in a number of counts, but as counsel says, very brief in each count, some 32 counts, charging contempt with failure to answer certain questions before the Kefauver Committee. These questions are as follows:

(Reads from indictment.)

Now, if the Court please, we are here in this proceeding and under the indictment inquiring into the affairs of Elmer F. Remmer. We are not inquiring into the affairs of David Kessel or of Walter Pechart. It has been shown by the evidence that has so far been introduced that testimony which could be given by Kessel and by Pechart is material to the issues here, because it has been demonstrated by the return, for example, that they had certain business enterprises in common. It is not material to this inquiry as to the amount of

profit or loss sustained by Pechart or Kessel from those enterprises. It is material to this inquiry as to the amount of profit which was obtained by the defendant Remmer, which is the only material inquiry which this court is making in this proceeding.

I wish to refer in that connection to the case of *United States vs. Greenberg*, reported in 187 Fed. (2) at page 35, which is a Third Circuit case, the decision having been written by Judge Maris. If I may read a little at length, because I believe it goes directly to the situation which we have here. I am reading from page 38, and this is an appeal from a conviction for contempt from a judgment of the district court for the Eastern District of Pennsylvania, finding the defendant guilty of contempt of court for refusal to answer certain questions:

“If, however, a direct answer to the question can not under the particular circumstances of the case upon any reasonable theory disclose a fact which is, in the words of Chief Justice Marshall, ‘a necessary and essential part of a crime’ the question must be answered. To support the claim of privilege the danger must be real, not remote or fanciful. It must appear that the answer to the question may disclose a fact which will supply a link in the chain of evidence which is necessary to establish the commission of a crime by the witness.”

Citing *Mason v. United States*, 1917, 244 U. S. 362.

“It is not enough that answers to anticipated later questions might do so.”

Citing *Camarota v. United States*, 3 Cir., 1940, 111 F. 2d 243, certiorari denied 311 U. S. 651.

"Applying this rule the district court considered the questions here involved and decided that direct answers to them could not incriminate the appellant of any federal crime. We are satisfied that the court was right in so holding with respect to each of the two groups of questions in controversy on this appeal.

"We take up first the group of questions relating to the use of the telephone at 1133 West Diamond Street, Philadelphia. The appellant had stated in reply to previous questions that he had regularly used that telephone but that he had not used it for his lawful business. He declined, however, to answer questions as to whether he used it for any other business and, if so, for what business, claiming that to answer would incriminate him.

"It must be conceded that some possible answers to a question as to a witness' business may be incriminating under the federal law. The witness may be by occupation an illicit dealer in narcotics, an illicit distiller or a counterfeiter. However, as this court pointed out in the *United States v. Hoffman*, *supra*, 'the question * * * is so frequently asked of witnesses as a mere identifying question that without more a court may well regard it as normally too innocent to fall within the Marshall principle.' Accordingly the witness 'must show the

court enough beyond his bare statement of crimination at least to indicate that his claim was not clearly groundless, a contumacious assertion made in bad faith.' "

Citing 185 Fed. 2d 621:

"It is not necessary, of course, for the witness to prove that his answer would actually be incriminating, for to do so would be to lose the privilege in establishing it. Accordingly he need not prove that the government has in its possession or that the grand jury has secured from him or from other witnesses evidence which when the answer to the question under attack is added, will be sufficient to complete the chain of evidence needed to convict him of federal crime. Here, as we shall see, the court was justified in concluding that a direct answer could not reasonably form a link in that chain. Accordingly the court did not err in refusing appellant access to the grand jury minutes and to the files of the government. Where, as here, the question was innocent on its face all the appellant was required to do was to satisfy the court that there was a reasonable possibility of the existence of facts in his situation and under the circumstances of his case which might convict him of a federal crime if a fact which might be disclosed by a direct answer to the controverted question were added to them.

"In the United States v. Hoffman * * *"

Well, I will strike the reference to Hoffman, as the Supreme Court case has been cited to your Honor. Reading further on page 39:

"The theory which the appellant advanced in support of his claim was that if he should state the business in which he used the telephone the next questions asked him would be whether he had derived income from that business, whether he had employees in that business, and whether he kept records of that business. His answers to these questions, he asserts, might tend to incriminate him of criminal violations of the internal revenue laws relating to the income tax and the withholding of income and social security taxes from employees' wages. We do not have to decide, however, whether the defendant may claim his privilege with respect to these questions for they have not been asked. What we have to decide is merely whether a witness may decline to state his business, although itself not unlawful under the federal law, upon the theory that he may have violated some federal law in the course of the conduct of that business and that subsequent questions with respect to the conduct of his business may develop these delinquencies. We think that to pose this question is to answer it. For to approve the appellant's contention would mean that every business man would be entitled to decline to state his business merely because it might be possible that in

carrying it on he had infringed the internal revenue laws or some other federal statute. This court ruled against this contention in *Camarota v. United States*, *supra*, when we held that Camarota was required to answer questions as to whether he had engaged in a certain business, not unlawful under the federal law, even though he contended that answers to anticipated subsequent questions as to his receipts from such business might tend to incriminate him of a violation of the income tax laws. See also *United States v. Weinberg*, 2 Cir., 1933, 65 Fed. 2d 394, 395 certiorari denied 290 U. S. 675, 54 S. Ct. 93, 78 L. Ed. 583. We accordingly conclude that the court did not err in denying the appellant's claim of privilege with respect to these questions."

Now as I have stated, with respect to the pending indictments in San Francisco, which are not based upon questions which would be material here or which it would be expected your Honor would be called to rule upon, nevertheless, if such questions were material here, I do not believe that the fact of an impending indictment in San Francisco should deter this court from exercising its judicial discretion in ruling upon the question as to whether or not the witness should be compelled to answer.

Counsel states that to compel a witness to answer certain of these questions would, in effect, be prejudging the case which is to be tried in San Francisco. If that were true, the court to uphold the

privilege against self-incrimination might also be considered pre-judging the matter. However, I do not believe that either situation is presented here. That is a proposition based upon a—well, I suppose you would refer to it as a quasi-judicial proceeding or a Senate investigation—where the witness when asked certain questions chooses to exercise his constitutional rights. Whether he was right or wrong is not for the determination, of course, of this court. We are now faced with an entirely collateral proceeding, in which they are called as witnesses, not as parties, where the inquiry is not made into their personal affairs in a manner which could incriminate them, so far as would appear from this record, but simply as to their knowledge of the affairs of the income of the defendant, Elmer Remmer. As to the method to be used, this Circuit has laid down the principles in *Graham vs. United States*, reported in 99 Fed. (2), 746, in a decision by Judge Wilbur. Reading from page 750:

“There is an inherent difficulty in protecting a witness against self incrimination. His mere assertion, however, advanced, that in his opinion the answer to a given question would tend to incriminate him is not sufficient to justify the witness in refusal to answer unless and until a sufficient showing is made to the court that the claim of the witness is a substantial one. That is, the court must be convinced that the answer of the witness would be calculated to incriminate him if he was guilty of an offense

foreshadowed by the question. When a witness is examined in open court his objection to answering a specific question is passed upon immediately by the court before the witness is compelled to answer."

Now for the convenience of the Court, if the Court desires to examine the record of the proceeding before the Kefauver Committee, I have here in shorter form, being in form of the proceedings themselves before the Senate against Mr. Kessel and Mr. Pechart for contempt, wherein is set forth a complete reporter's transcript of the testimony. This refers specifically to the particular matters involved.

Now insofar as investigation of these witnesses by the Bureau of Internal Revenue is concerned, I have no doubt that investigation is under way. I accept Mr. Wiseman's statement in that regard. I have nothing to do with the investigation myself, but if that is true, nevertheless the statistics show thousands of citizens are investigated daily, there are thousands of revenue agents in the Senate for that purpose and for the purpose of auditing and investigating returns, and unless the danger became apparent and real and as pointed out in the Greenberg case which I cited to your Honor, any business man could refuse to testify as to any aspect of his business. Further, as I have previously stated, the questions directed, and intended to be directed to these witnesses, do not relate to their own net incomes, to the profits which they them-

selves received, but to those of the defendant, Elmer Remmer. So far as criminal violations of the Internal Revenue Code are concerned, the year 1944 is now beyond the reach of the statute of limitations, assuming that a timely income tax return is filed. The statute of limitations is within six years of the time the offense has been committed. The civil statute for assertion of tax liability is ordinarily three years, with the exception of those cases where the understatement of income is in excess of 20 per cent, in which event the statute is five years, unless waived by the taxpayer. Under all the circumstances of this case, if the Court please, it is the position of the government that we are entitled to pursue with these two witnesses the matters which are material and within the issues of this case.

For the record I would like to state briefly the questions set forth in the indictment of Walter Pechart and which he refused to answer on the ground of his constitutional privilege and which were the basis of the indictment against him in the Northern District of California, which are as follows:

(Reads from indictment.)

I might state further, your Honor, that it is the position of the government that should any of the questions which are the subject of that indictment become material to the inquiry here, then we shall ask such questions and ask the ruling of the Court to compel the witness to answer such questions on the basis of their materiality to the instant proceed-

ings because otherwise the mere return of an indictment—or in an instance where no indictment had yet been returned, but there was fear of an indictment because there had been a citation or statement by a committee chairman of the Senate that the witness was in contempt—would successfully impugn and might entirely block the progress of the duly constituted courts of the United States in their function in handling of their business and in determination of lawsuits and criminal actions pending before it.

We will submit it, your Honor.

Mr. Wiseman: If the Court please, I hope I do not misunderstand Mr. Campbell. He refers to the fact that this being a collateral matter, that it might not be available to a witness in a collateral matter, the right to exercise his constitutional privilege. I hope I did not misunderstand him—he is a very able lawyer, but if there is any indication to this court that because the defendants are not directly involved in this case, or say some subsequent case, that for that reason the right to invoke their constitutional privileges is not reserved to them, I think—

The Court (Interceding): I do not so understand Mr. Campbell and I have not that idea myself.

Mr. Wiseman: He mentioned a collateral matter, your Honor—

Mr. Campbell: No, I do not so contend.

Mr. Wiseman: The other case he cited, Graham vs. United States, 99 Federal (2) 746, was fa-

miliar to us and that is the very point I make before this Court. In other words, Judge, as I said at the inception of the argument, a showing has to be made to you, so that you can determine whether or not any particular question was or was not material, whether a witness could or could not exercise his privilege. The very point, Judge, I argued at the inception of the argument, an opportunity to present to you and make a showing so that you could rule, that you have the facts before you to determine the case. Unless you have those facts, unless you have the showing, as suggested by *Graham vs. U. S.*, it places yourself completely in the dark as to the ground upon which, or the basis upon which, a witness comes before you and exercises his constitutional privilege. We are in direct accord with that and that is the very thing, your Honor, I have been attempting to present to you, the showing from which you could determine whether or not the question, innocent of itself, might or might not incriminate this witness. There is no question about the rule of law and it is expressed, as we concede, in *Graham vs. United States* for the reason of presenting, of making a showing, as we have attempted this morning.

Now, your Honor, with respect to *Greenberg vs. United States*, if your Honor reads that case you will find out the court considered the only business question as related in the facts of that case and the court properly, in that case, because the questions had not been answered, did not anticipate what they might have been and consequently made no

ruling upon them, which confirms the very thing I am suggesting here to your Honor, that unless you have, as you do have in the indictment, questions relating to their income, their business associations, you are not in a position to rule on it and in the Greenberg case, as read to you by counsel, the very acts of these defendants are set forth and it is the very purpose that we had coming before you at this time, Judge, is to impress upon you the fact—as your Honor says, you can not anticipate them at this time certainly—and it is for that very reason, Judge, that we made suggestions with respect to the method of procedure.

Now on the question of Pechart, I hand you my transcript and I tell you the questions contained in the indictment have to be read in connection with other questions referred to in the transcript generally. Now with respect to Pechart, in the transcript I had, which has been supplemented now by loose sheets presented by Mr. Campbell, questions were asked by that committee on page 515 of the transcript:

(Reads.)

The only purpose of those questions is not to establish that they might be guilty of some offense against State law, the very questions asked, in the light of surrounding circumstances, indicate that the inquiry was made to ascertain if there was any offense in respect to his income tax problems and whether it appears in that, it certainly appears in

the transcript, the committee announced publicly and through the press that any information of an interesting nature would be turned over to the Bureau of Internal Revenue.

Now further with respect to Pechart, your Honor, and on the subject matter of the indictment, questions arose and were asked him with respect to ownership of property, how much his home cost, whether it was mortgaged, whether he owns business property and other questions, your Honor, relating to the question upon which the committee sought the indictment.

Now, your Honor, I have nothing further in that connection. I will submit the matter to the Court, and before I do it, may I call both witnesses. They are in court, have been in court since 10 o'clock, and I respectfully ask that their bail be exonerated.

The Court: No, the bail will continue and both witnesses ordered to appear here at two o'clock this afternoon and I will just give you my thoughts at the present time. If the matter should occur to me before two o'clock I, of course, would change my view, but when they come into court at two o'clock I am going to ask counsel for the government to again propound to Mr. Kessel the question which I think is the question, the refusal to answer of which precipitated these proceedings, so far as he is concerned: "Do you know Mr. Remmer's occupation?" and if he refuses to answer the question, or if he raises his privilege on the grounds an answer to the question might incite him, I will

then order him to answer the question and then if he refused, I will commit him for contempt of this court.

In regard to the witness Pechart, he is ordered to appear here at two o'clock and at that time I will request the government counsel to again propound to him the question which I understand to be the question which precipitated these proceedings this morning: "Q. With regard to a portion of the premises which you rented from Mr. Remmer known as the San Diego Social Club, did you operate any business on those premises?" If he claims his privilege under the Fifth Amendment, the Court will then order the witness to answer the question; upon his refusal to do so, he will be committed for contempt of this court.

So we will be in recess in this case until two o'clock and the witnesses Pechart and Kessel are ordered to appear here in court at two o'clock.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at the Hearing on Contempt of Court of David N. Kessel and Walter M. Pechart, held at Carson City, Nevada, on December 11, 1951, and that the foregoing pages, num-

bered 1 to 40, inclusive, comprise a full, true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, December 24, 1951.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed December 27, 1951.

[Title of District Court and Cause.]

HEARING ON PLAINTIFF'S MOTION TO
QUASH SUBPOENA DUCES TECUM
AND DEFENDANT'S MOTION TO IN-
SPECT

Be It Remembered, That the above-entitled matter came on regularly before the Court at Carson City, Nevada, on Tuesday, the 27th of November, 1951, the plaintiff being represented by Miles N. Pike, Esq., and Bruce R. Thompson, Esq., and the defendant not being present in court but represented by John R. Golden, Esq., Leslie C. Gillen, Esq., and the firm of Lohse & Fry, by George Lohse, Esq. The following proceedings were had:

Mr. Pike: Your Honor, with reference to the case of United States of America vs. Elmer F. Remmer, as stated, previously this morning there has been a motion filed by defense counsel, supported by certain affidavits, in connection with which additional affidavit was received by me in

yesterday afternoon's mail—as a matter of fact, two additional affidavits, those of Mr. Gillen and Mr. Christopher P. Miller, and likewise I wish to state to the Court that heretofore, on November 23, 1951, I was served with subpoena duces tecum to appear before this Court at this time as a witness, and I, of course, have so appeared in response to the subpoena.

Now it is my understanding—and in this I have only indirect information—that Mr. Walter M. Campbell, Jr., who is of counsel for the plaintiff in this case, for the purposes of this case, and Special Assistant United States Attorney, was, I am informed, served with a similar subpoena duces tecum at San Francisco, California, on or about November 20, 1951. In looking over the courtroom this morning, I did not see Mr. Campbell present and so before proceeding, as the Court may designate, with reference to either the motion filed by defense counsel or the motion to quash the subpoena, I feel it incumbent upon me to tender such explanation as I am in position to make with reference to the non-attendance of Mr. Campbell at this time. Of my own personal knowledge I can simply say that the last conversation I had with Mr. Campbell was on Wednesday afternoon before Thanksgiving last week, which places it November 21st, and at that time he expressed his plans as arriving in Reno, as I understood, on last Friday. Now since then I have had no direct communication with him. I have talked to Mr. A. V. Brady, who is connected with the Bureau of Internal Rev-

ence and who is present in court this morning, and Mr. Brady has handed me two telegrams, each addressed to him in care of the United States District Court here at Carson City and dated respectively November 25th and November 26th of this year, both signed Walter M. Campbell, and the first one stating in substance that Mr. Campbell would arrive tomorrow morning—that should have been yesterday morning, considering that the wire was sent November 25th, your Honor—and suggesting that Mr. Brady meet Mr. Campbell if possible, and the more recent wire was directed to Mr. Brady, stating that Mr. Campbell had been delayed by illness, that he would arrive tomorrow morning—which would be this morning, November 27th—and suggesting that Mr. Brady meet him. Now other than that, I have no personal information, except that I have been advised indirectly that Mr. Campbell is en route to Reno and Carson City, and the purpose of my explanation, as is apparent to the Court, is in reference to the subpoena which, if it was served, requires an explanation.

Now with that exception, I might state that in the absence of Mr. Campbell, the United States attorney's office is prepared to proceed at this time on the hearing of either of the defendant's motion to produce, which has been set for hearing at this time, or upon the government's motion to quash, which was filed with the clerk of the court just this morning and copies of the Notice of Motion and Motion to Quash Subpoena Duces Tecum served upon Mr. Campbell and myself were handed to

defense counsel in Reno yesterday afternoon. I do not wish to presume to indicate the order of the hearing on the respective motions and of course I realize that defense counsel would wish to be heard on that, but while addressing the Court I would respectfully suggest that the Court consider hearing the motion to quash the subpoenas because, although I have appeared in response to the subpoena, I have filed this motion to quash the subpoenas *duces tecum* for the reasons stated and under the authority of Federal Rules of Criminal Procedure No. 17(c), and as the Court will observe, there is a provision about the middle of that paragraph sub-division of the rule that the Court may, when the motion is promptly made, quash such a subpoena.

Mr. Golden: If the Court please, without waiving any rights we may have, we do not make any point of the fact that Mr. Campbell is apparently unavoidably detained and are perfectly willing that the matter be treated as though he were here in response to the subpoena. We are likewise perfectly agreeable, if the Court so wishes, that Mr. Pike proceed further with his motion to quash.

The Court: Very well, thank you. So you desire to proceed with the motion to quash?

Mr. Pike: Yes, your Honor. I do not know as the Court has before it a copy of the subpoena *duces tecum* itself, and I make particular reference to it because, as the Court will observe, there is affixed to the document a typewritten sheet which designates the books, papers, documents and ob-

jects sought to be produced here in Court in response to this subpoena and as the motion for the production of certain records filed by defense counsel refers to the decision of the United States Supreme Court in the case of Bowman Dairy Company vs. United States of America, dated April 30, 1951, 341 U. S. P. 214, 95 Advance Sheets, 95 Law Edition 879. I have the Supreme Court advance sheet here, your Honor. I refer to that particularly because on the second page, as appears in the advance sheet of the Bowman decision, there is a quoted portion of a subpoena duces tecum involved in that case, which is not identical with this, but I may say very very similar to it, as a close comparison will disclose. I may say, your Honor, I refer to the Bowman case—this may seem presenting my argument a little in reverse—because the Bowman decision is the decision referred to in the moving paper on defendant's motion to produce, but the subpoena is the language, of the books and other records sought to be produced, I would say substantially identical with the subpoena quoted in the Bowman decision. There are some differences.

So I refer now to Rule 17(c), which, of course, is the authority relied upon for defendant's motion and which is likewise the authority relied on for the motion to quash now before the Court, and reading the entitlement of that sub-section, "For Production of Documentary Evidence and of Objects." Then reading on: "The subpoena may also command the person to whom it is directed to produce papers, documents or other objects designated

therein * * *,” and the government is in reliance upon this next section: “The court, upon motion made promptly, may quash or modify the subpoena if compliance would be unreasonable or oppressive.” Reading on:

“The court may direct that books, papers, documents or objects designated in the subpoena, be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects, or portions thereof, to be inspected by the parties and their attorneys.”

And so at this time, pursuant to the Notice of Motion heretofore served and filed, I make the motion to quash the two subpoenas served upon Walter M. Campbell, Jr., and myself.

As the moving authority, I refer particularly to the affidavit made by Mr. Campbell and filed and read before this Court at the recent session held at Las Vegas, Nevada, on November 8th, as I recall, 1951, and as those affidavits are rather fresh in the mind of the Court, unless the Court indicates otherwise, I will not read the affidavit again at this time.

I have set out in this motion to quash the subpoena that compliance with the subpoena duces tecum would be unreasonable and oppressive, without designating the facts or the asserted basis for that statement. However, as further grounds I have set up, on line 29 there on the first page of

the Motion that the "records enumerated and designated in each of the two said subpoenas refer to records that have heretofore been made available for inspection of the defendant or his duly authorized representatives on occasions long prior to the scheduled date of the above-entitled action upon the merits, which scheduled trial date is presently set for trial with a jury at Carson City, Nevada, at 10:00 a.m. Wednesday, November 28, 1951," which is tomorrow. And in particular connection with that, the Court will recall the defendant's motion for a continuance of the trial date and of the motion to produce under Rule 16 of the Federal Rules of Criminal Procedure, which were presented and argued before the Court at Las Vegas and denied by the Court, the Court will recall in that connection the affidavit of Mr. Campbell, and will likewise recall the contentions made by Mr. Campbell before the Court sitting at Las Vegas that on two occasions; namely, the occasion when Mr. Friedman, an accountant from San Francisco, and one of those persons named as authorized to act under the power of attorney designation filed by the defendant with the Bureau of Internal Revenue, was given free access to these records at San Francisco, and I believe that a proper statement to make, from what was presented to the Court at that time, both through the affidavits and through the discussion that took place between defense counsel and Mr. Campbell and his assertions to the Court, that Mr. Friedman spent substantially a week with those records.

Reference is made in these moving papers to the circumstance of there being no money available to pay accountants' fee and for that reason an examination was not made.

The second circumstance referred to in this paragraph 2 of the government's motion to quash will likewise be brought to the recollection of the Court through the Las Vegas hearing the affidavit statements of Mr. Campbell, to the effect that Mr. Lawrence Semenza, a certified public accountant at Reno, Nevada, being another of the persons designated to act under power of attorney through the document filed with the Bureau of Internal Revenue, examined the records in San Francisco and not only examined them, but took a considerable number of those records with him. The Court will then recall the matters reflected, as to the efforts made by representatives of the Bureau of Internal Revenue to have the records returned to that Bureau and their inability to obtain them for the stated reason as appears in these documents, that Mr. Semenza had given the records to Mr. Friedman and that Mr. Friedman had purportedly given the papers to Mr. Golden, presently of defense counsel, and that those records are not available to the government for production by reason of those particular circumstances.

And the third paragraph of the motion to quash—

The Court: The records that were turned over to the auditor were never returned to the government?

Mr. Pike: Were never returned. The facts, according to the government's contention, were substantially those already stated but the Court will understand, of course, that I am predicated my statements on what was presented to the Court at Las Vegas. I am undertaking to adhere to that. Many of these matters are not in any way within my personal knowledge, but they are set forth in these various affidavits and documents and were related to the Court there. So that those would be the two occasions referred to in this present motion to quash when certified public accountants, authorized to act on behalf of the defendant, had an opportunity to examine them. Defendant complains that there was not money available to pay those accountants and for that reason they should be given opportunity to examine at this time.

I do not think it is incumbent upon me, as government attorney, in this or any other case, to assume a harsh position and when I have stated here in the language of Rule 17(c) that this is unreasonable or oppressive on the government I, of course, had in mind the meaning of those terms and I had in mind that factually that was true. Here we are the day before the trial. I have not said in so many words in this motion to quash that this is not the time to begin, and I do not think that is necessary, but it is not the time. We have had these proceedings extending over a period of years. Negotiations between representatives of the Bureau of Internal Revenue, the office of the Attorney General, and since April of this year there

has been an indictment pending against the defendant, and it does not appear to me that there is any proper justification or explanation for seeking to inspect and take copies at this time, the day before trial.

This next paragraph says in substance that the books, papers, documents and other records referred to in this subpoena are substantially those referred to in the motions had before the federal court—I said in here on November 8th earlier this morning and I was mistaken, it was November 15th, at Las Vegas. Now I am not going to indulge in long argument on the same, but I respectfully submit to the Court that examination of papers show that they are the same and the argument would be the same. If the Court will look at the bottom of this small paper attached and forming part of the subpoena duces tecum, it refers to these particular clubs or businesses in which there were certain records turned over, so without discussing the Bowman case at this time, I want to refer to the case of United States vs. Maryland & Virginia Milk Producers Association, which is decision of the United States District Court, District of Columbia, of December 2, 1949, and it appears in 9 Federal Rules Decisions, page 509, and the decision is written by District Judge Holtzoff. Now by way of comment, your Honor, Judge Holtzoff is one of the co-authors with a Mr. Barry of the text on Federal Rules of Criminal Procedure, and if the Court and counsel will recall, in the preliminary drafts of these rules and the discussions that were

had at the time the rules were being formulated for presentation to the Supreme Court of the United States for consideration and enactment, Judge Holtzoff took a very leading part in those discussions. I do not have it in court, but I have one of the official publications containing the draft of the rules as finally enacted before the recent amendments and that volume has in it the discussions and shows the participation by, who is now Judge Holtzoff, as the basis for each of the particular rules. So I am going to read this short one-column decision of Judge Holtzoff on page 510, as follows:

“In this prosecution for alleged violation of the Sherman law * * *”

giving the citation for it:

“* * * the defendants have applied for a subpoena duces tecum directing the Government to produce for the defendants' inspection all documents which the Government has obtained from any person who is not a party to this proceeding. In other words, the defendants seek a broad discovery of all documentary evidence that the Government has obtained in support of its case, with the exception of such material as is covered by the recently coined and apt term of 'work product' of a lawyer.

“Defendants seek to support their application by reference to Rule 17(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. This rule relates to the issuance of subpoenas duces

tecum and contains the following provision on which the defendants here rely: 'The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.' ''

The decision goes on:

"The purpose of this provision is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision.

"(2) In this case the proposed subpoena duces tecum is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery for the purposes of inspecting all the documentary evidence in possession of the Government and which the Government intends to use at the trial.

"(3) It is well settled that in a criminal case, unlike a civil action, such a right of broad discovery does not exist. As I said before, Rule 17(c) was not intended to be a discovery provision, but merely a means to make a subpoena duces tecum returnable prior to

the trial in order that time at the trial may be saved while documents are being examined and inspected.

"In the light of these considerations, the motion is denied."

Now let us see about this *duces tecum*. This is to inspect some documents that are going to be subpoenaed and look at them ahead of time by what is characterized as, out of the Bowman decision itself, a fishing expedition. I am reading now from the portion which says what the defense counsel would like to have produced here: "All books, papers, documents and objects (except memoranda prepared by government counsel, and documents or papers solicited by or volunteered to government counsel which consist of narrative statements of persons or memoranda of interviews) * * *"; then leaving out the written narrative statements or other matters enumerated within the observations as to exceptions, then it goes on:

"* * * obtained from or belonging to the defendant or obtained from others by seizure or by process or obtained by Government counsel in any manner other than by seizure or by process, * * *"

The Court has in mind Rule 16 that was invoked at the previous hearing and its limitation to seizure or process. And then it goes on:

"* * * (a) in the course of the investigation by the Grand Jury which resulted in the return of the indictment herein, and (b) in the

course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to said Grand Jury, or (b) are to be offered as evidence in the trial of the defendant under said indictment, or (c) are admissible in evidence either for or against the defendant with respect to any of the allegations or charges contained in said indictment, * * *"

And as to that last, your Honor, I do not know how it is to be determined whether any of these are admissible in evidence until we see what the foundation is and the document is, and then:

"* * * including without limitation the books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of, the following businesses for the years 1944, 1945 and 1946, from which businesses the United States contends the defendant received taxable income as an owner during said years: * * *"

And then it enumerates some nine or ten clubs or businesses, and then goes on:

"* * * and any other businesses from which the government contends defendant received income as an owner during said years."

Well, I think the broad discovery feature, or attempted discovery, of the subpoena duces tecum is quite apparent.

I might say the only other case I found, your Honor, that pertains to this general subject of Rule 17(c) is a decision of the Ninth Circuit Court of Appeals and it is in the case of Flynn against the United States. Decision was rendered on January 10, 1949, and reported in 172 Fed. (2), at page 12, and the decision is written by Circuit Court Judge Stevens and in the case generally a man was charged with having impersonated a federal officer and was found guilty of that charge and then he was subsequently indicted and tried and found guilty of perjury committed during the first trial, and our reading of the volume shows substantially as it relates to Rule 17(c) apply to anything like our present facts, simply that when the trial was on—I am now on page 14:

“Before the date set for the trial of the case, appellant made a motion for the issuance of a subpoena, under Rule 17, Rules of Criminal Procedure, and for a continuance, but the court denied it without prejudice. Before going to trial appellant made a motion that the case be continued because certain letters had not been received or witnesses subpoenaed, and this motion was renewed at the close of the Government’s case in chief.”

And at the conclusion a similar motion was made, but in that particular case, as I read this decision, it was held to be no error because a continuance was denied in order that a certain letter might be made available or further efforts might be made

to develop the whereabouts or contents of such a letter.

So then if we take the ruling of the United States Supreme Court in the Bowman case and restrict it to what it actually held under the proposition of law that a case is to be taken for what it holds, why it is not considered here that the holding of the Bowman case, which was this person who had refused to produce records in response to the subpoena duces tecum was not in contempt of court for such failure, we find that has no governing authority against this motion to quash, but on the contrary you can find certain portions of it that would have close application to this situation where the Court says, for example—this is on page 7 of the advance sheet, in the concluding portion of the opinion—it says:

“Clause (c), which is the last clause in the subpoena, reads as follows:

“‘are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants. * * *’”

And I ask the Court to note the very slight departure made from that language, which was characterized as a fishing expedition, the language by the United States Supreme Court, from the language appearing in the concluding portion of this instant subpoena duces tecum and essentially it is a transposition of language similar and the insertion of additional clause in there and the fishing expedi-

tion language is left there. But the Court then said:

"This is a catch-all provision, not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up. The clause is therefore invalid."

And it held that one would not be held in contempt under a subpoena that is part good and part bad. Now possibly there has been an effort made here to take out the bad part, but I do not see where that has been accomplished and under the ruling of the Bowman case this subpoena, with its fishing expedition language, I would say would come squarely under the Bowman case. Well, I can make a comparison here. Here is the fishing expedition language, the quoted portion, as compared with the language in the instant subpoena. I refer to Clause (c). If the Court will look at the quoted portion in the Bowman decision and then look at the clause, same (c), in our present subpoena, the Court will see what I mean. On the last page of the Bowman decision. The Court has a discretion here but it is the government's contention that there is nothing in the Bowman decision that abandons that discretion of the Court requiring protection of what amounts to a discovery proposition, as stated. In the Bowman decision we have the following language:

"It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms."

And the Court recalls there it is seizure by process. Here Rule 16 has been invoked. The motion is based on Rule 16, has been denied, and now counsel are back with Rule 17(c) and it may be that under this Bowman decision there is this right of discovery. The government contends otherwise.

The Court: We will take a recess until 1:30.

Afternoon Session—November 27, 1951, 1:30 P.M.

Mr. Pike: I had finished addressing the Court on the opening argument to quash subpoenas.

Mr. Golden: If the Court please, as counsel has indicated, there are two motions here, the first of them a motion for production and inspection of books, papers, etc., and it calls for, as counsel has stated, all these documents, with the exception of certain items which we consider to be private memorandum and inadmissible in evidence, private memorandum belonging to the government, which we are not asking for. It calls for all the material admissible in evidence which has been admitted in evidence before the grand jury, or is intended to be used in evidence at this trial, or which could be used in evidence, either for or against the defendant. In other words, I would like to make it quite clear at the outset that the only things we are asking for are things which are admissible in evidence. Now counsel says, how can you tell in advance whether something is admissible in evidence or not. What we call for, and what I think anybody reading it would understand, what we call for is anything which, under the accepted rules of this court, would be admissible in evidence.

This motion is made in connection with the subpoena which was issued in accordance with Rule 17 of the Criminal Rules and likewise in accordance with that section the government made a motion to quash the subpoena. As counsel has indicated, the controlling portions of that rule, for the purpose of the two motions—if I may be permitted to read that again, just so we have that in mind right here. As to the government's motion, the sentence is:

“The court on motion made promptly may quash or modify the subpoena if appliance would be unreasonable or oppressive.”

In other words, I submit to your Honor respecting that, subpoenas which were issued as a matter of course under the rule cannot be quashed unless your Honor finds that the compliance with those subpoenas would be unreasonable or oppressive.

Now then our motion is made under authority of the sentence that follows in Rule 17:

“The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects, or portions thereof, to be inspected by the parties and their attorneys.”

Now your Honor will note the very purpose of this motion and of that sentence is that these documents and objects be produced either prior to the

trial or prior to the time they are offered in evidence. We have under the rule, if the Court please, I submit a perfect right to subpoena anything which the government has, subject only to the limitation that if the Court finds that what we call for, that the supplying of what we call for, would be unreasonable or oppressive, the Court may limit us, but the purpose of our motion is not to ask for a validation of the subpoena--the subpoena is valid --the purpose of our motion is to ask that these matters be produced in advance, as provided by the sentence I just read.

Now your Honor has in mind, I am sure, and your Honor's recollection was partly refreshed this morning by Mr. Pike, that this is the last in a series of efforts by the defendant—and I do say this respectfully—to compel and force the government to tell us what this defendant is charged with and give us sufficient information to enable us to prepare our defense. Now I know that ordinarily an indictment tells the defendant what he is charged with and I know that ordinarily—although this is in the discretion of the Court—ordinarily the testimony before a grand jury is not available to the defense in federal courts. However, your Honor, I am sure, has in mind that this indictment simply charges the defendant with a wilful non-payment or evasion of lump sums of income tax for specific years and does not give him any information whatsoever as to the basis on which the government is going to make its case, and at this point I call your Honor's attention, without going

into any detail, to the affidavit of Mr. Spurgeon Avakian on file herein, which is one of the affidavits which was used before your Honor last week in Las Vegas, and in that affidavit, on page 5, it is set out in columnar style, so it is very easy to read, for each of the three years the returns which the taxpayer made—when I say the returns he made, I mean the amount of tax shown by the returns he made—in the first column; in the second column the amount of tax which the government claims civilly he owes and in the third column the amount of tax upon which this indictment is based, and the figures are very interesting. For example, the tax on returns for the year 1944 is 19 thousand and tax by the 90-day letter is 136 thousand plus and the tax according to the indictment is 67 thousand plus. 1945 is even more interesting. It varies between 59 thousand for figures shown by the returns to 265 thousand by the 90-day letter issued by the plaintiff in this case, and in the indictment it is down to 75 thousand. The totals show return and tax of 100 thousand that civilly it claimed it should have been almost 600 thousand and on the indictment that is something over 300 thousand. I believe the indictment, as a matter of fact, only charges about 155 thousand, but in any case there is a great variance between the figures. I am not going into any detail, your Honor, in the matter of those particulars. That matter was argued here. I do want, however, and I think I should in fairness to our client, inform the Court of an impression the Court apparently has, which we believe is

incorrect. I refer now, your Honor, to a statement made by the Court at Las Vegas last week—we had the proceedings written up—I don't know whether the Court or the government ordered or have copies, but this copy is available to anybody who wishes to read it, and at that time your Honor, I believe the Court was under the impression that in connection with that demand for bill of particulars there dilatoriness or something of that nature on the part of defendant's counsel. Your Honor said this:

"I have a recollection of the hearing June 15th in Carson City on motion for bill of particulars. I think at the conclusion of that hearing the Court suggested that counsel confer with Mr. Golden and Mr. Pike and the suggestion was made that certain information be furnished Mr. Golden at that time, and I also recollect that the Court at the time, in the event Mr. Golden did not receive the cooperation from Mr. Pike that the Court indicated should be given, he could apply to the Court later. Now no application of that kind has been made in relation to those proceedings June 15th."

In other words, I gather from that, your Honor, that the Court is under the impression that after the argument on the bill of particulars and after the Court's denial of it on June 15th, the door was left open to us to reapply. What actually happened, if I may refresh your Honor's recollection,

is this. The indictment was filed on the 9th of April. Defendant was arraigned on the 27th of April and made a motion for bill of particulars. At that time your Honor suggested that counsel on both sides get together and if the government did not supply what the defendant felt he was entitled to, then the defendant could apply to the Court for an order on motion for bill of particulars. Now the motion for bill of particulars was filed on April 27th. On May 11th, hearing nothing, I wrote to Mr. Pike. I did not get an answer. I discovered later—this is not meant to be critical—that after he got my letter at Reno he forwarded it to Mr. Campbell in San Francisco, but at any rate, not hearing from Mr. Pike in answer to my letter of May 11th, on May 17th I wrote to Mr. Dickey, the clerk of this court, and he replied on May 21st, telling me that he had taken up the matter with the United States attorney. I have all those letters here and if it is felt to be of any consequence, I would be very happy to read them into the record. Now hearing nothing from the government, on June 1st I wrote to Mr. Pike and asked him to arrange for a date for argument on bill of particulars and then I got a letter from Mr. Pike telling me that the matter would have to be taken up with the Court and a date was arranged for June 15th. In other words, your Honor, the opportunity to get any information about this charge from government counsel was requested before the argument on the bill of particulars and it was pursued with dispatch and we waited an interval of some

two weeks, wrote to them, heard nothing, had correspondence back and forth, and finally it was put on the calendar and then your Honor denied that motion and there was thereafter no indication from either the Court or counsel that we could make any further attempt by way of bill of particulars to determine just what the government is going to charge at the trial of this case, because we couldn't get that information from the indictment.

Now may I pause there just one moment, your Honor. At the time your Honor denied that motion I did not take an exception and I believe under the rules that is not necessary, but may I just for the purposes of the record at this time renew the motion for bill of particulars and except to your Honor's denial.

The Court: I have no objection to exception being noted as of that date.

Mr. Golden: All right, thank you.

The case at that time was set for November 7th for trial and by virtue of the congestion of the calendar it was continued, first to November 15th and then to November 28th for trial. Now on November 15th in Las Vegas Mr. Gillen, on behalf of the defendant, made two motions, one for continuance, one to inspect and take copies of certain material which the government had. Now I take it from the transcript of the proceedings down there that your Honor denied the motion to inspect, largely if not wholly, upon the ground that your Honor was given the impression that the defendant had had ample opportunity previously to

inspect and take copies of the material which he was entitled to have under Rule 16.

In that connection, may I call to your Honor's attention at this point the fact that Mr. Campbell's statements before your Honor on November 15th are not positive statements, but rather either based on hearsay, you might say, or at any rate vague. There are two statements, the first is on page 26, in which Mr. Campbell says:

"Now I might state to the Court that these records, to which counsel previously referred, the records which are still in possession of the government, have been examined, and I believe in detail, * * *"

Those are his words:

"* * * and I believe in detail, by the representatives of the defendant Remmer."

And again on page 27 he says:

"I am advised Mr. Friedman, together with some associated accountant in his office, spent approximately a week going over these records."

"I am advised" that Mr. Friedman did that. Mr. Campbell is not speaking of his own knowledge.

Now it never occurred to us, in preparing those motions, that Mr. Campbell might not have personal knowledge of the actual situation and therefore, to cure that what we believe was misstatement given the Court, we have prepared an affidavit in

connection with this motion, to which I will refer in such a motion, but on connection with those motions in Las Vegas, we, for the same purpose at this time renew them and except to the Court's denial.

The Court: The exception may be entered in the record.

Mr. Golden: Now without further preliminaries, we come to these motions here. Now in discussing this I am going to talk in favor of our motion and against the government's motion all at the same time, because the motions are really contradictory to each other, in our opinion. One of the points which the government makes is that this case is set for trial tomorrow and by inference therefore our motion is not timely and their motion should be granted, because it comes too late. In that connection, your Honor, the language which I read from Rule 17 of the Rules is, I believe, a complete answer. It says that the Court may direct that these matters be produced at a time prior to trial or prior to the time when they are to be offered in evidence, which to us means that a motion could be made even in the middle of the trial that certain matters be produced in advance for inspection of the defense, and I might say to your Honor, because I expected Mr. Campbell would be here, but it is the practice in San Francisco, which, of course, is not binding upon your Honor, that those motions are accepted or entertained during the middle of a trial and in this last case which Mr. Campbell prosecuted such a motion was made and granted. I am not

saying that as any authority, but simply referring to it.

Furthermore, your Honor, it was only on November 15, 1951, that we learned, through statements of Mr. Campbell, at that argument, that material, which they have which we are trying to see and which they do not want to let us see, is material which, according to the government, was not obtained by seizure or by process and therefore would not be available to us under Rule 16 but only under Rule 17. That appears on page 25 of the transcript, where Mr. Campbell says:

"I might say none of the records referred to which I am referring to, or any of the records in connection with this case, were obtained by the government either by process or by seizure; all records were given voluntarily to the government by third parties."

Now we didn't know that until approximately ten days ago and immediately upon return of Mr. Gillen from Las Vegas and the delivery of the transcript of what was said there, this present motion was made.

There is one other little point I want to mention in that connection. Mr. Campbell stated at that hearing—and I am saying this in self-defense—that it appeared Mr. Semenza had been on power of attorney signed by the defendant for a long time, and by inference he indicated that he had become connected with this case only in September, 1951. The fact of the matter is, as I pointed out to the government, civilly he is claiming a

large amount of money from this defendant, a different amount, based upon different factors than this indictment is based on, and while Mr. Semenza has been on that power of attorney and has had opportunity to do some work in connection with this 90-day letter, we are now met with an entirely different case and it was only in September that we were able to make arrangements, which are not financial arrangements, I might say, that he would express himself as willing to associate himself and work on this criminal case and at the times that the accountants in San Francisco and Mr. Semenza, according to Mr. Pike's statement this morning, were permitted to see these matters, there was at that time no indictment, there was no reason for them to look at those matters from the point of view of this indictment. They couldn't. They didn't know what the indictment said.

To go into this a little further, one of the new affidavits—and I am not going to read the ones we used in Las Vegas, they are available—one of the new affidavits is that of Mr. Gillen and I will either read it in full or describe it, as your Honor desires. Has your Honor had an opportunity to read it?

The Court: No, I have not read it.

Mr. Golden: Will it be all right if I just paraphrase it?

The Court: Yes, sir.

Mr. Golden: Mr. Gillen recites he is an attorney and one of Mr. Remmer's attorneys here and that at a time in the latter part of March, 1951—

The Court (Interceding): I think this is practically the same as the matter we had in Las Vegas. The facts in the affidavit here this morning seem to contain facts brought before the Court in Las Vegas.

Mr. Golden: This particular affidavit of Mr. Gillen's is to a large extent to remove certain impressions that we felt the Court had as to the facts in the matter in Las Vegas in connection particularly with your Honor's statement in Las Vegas that the defendant himself had never said he was without funds, but only through his lawyers.

The Court: Isn't this motion to the same effect as that in Las Vegas?

Mr. Golden: No, your Honor.

The Court: This is a motion for continuance and—

Mr. Golden: To inspect and take copies.

The Court: What is the difference between that motion and the one now before the Court?

Mr. Golden: The one in Las Vegas was to inspect and take copies of material which was obtained by the government by seizure or process. Now they come in and say they don't have, on November 15th they say they don't have, any such material obtained by seizure or process and we now are making motion to obtain all the material which is admissible in evidence, either for or against the defendant. It is not limited to material obtained by seizure or process. It is a motion to see in advance evidence and matters which may be used as evidence. Under the Supreme Court case, which

I am getting to in just a moment, a distinction is made between matter obtainable under Rule 16 and under Rule 17(c).

The Court: Well the motion formerly made was made under Rule 16?

Mr. Golden: Yes, your Honor.

The Court: And the present motion has nothing to do with the subject matter of Rule 16?

Mr. Golden: No, it has not, except to this extent, that as the Supreme Court had held the matter objectionable under Rule 17(c) may include matter also objectionable under Rule 16, but Rule 16 is more limited, more restricted, than Rule 17(c), that is, as to the type of material taken.

The Court: A motion under Rule 16 could only operate on and have effect upon matters which had been taken from the defendant—

Mr. Golden: Or belonging to him.

The Court: —or belonging to the defendant or obtained from others by seizure.

Mr. Golden: That is right, your Honor. As I said, Mr. Campbell stated to your Honor last week that none of the material which the government has was obtained by seizure or by process; therefore, now, in view of the denial of that motion and in view of this statement, we make this motion under Rule 17(c).

There are two purposes to Mr. Gillen's affidavit. Without reading it in full, one is it points out that at all times in the matter of the defendant's financial position—and he has brought out and does have perhaps some bearing, although we do

not think so, the Supreme Court and government has mentioned it—that he has been willing to make an affidavit that he is without funds. The only affidavit he is unwilling to make, on the advice of counsel, is the detailed statement of his assets and liabilities and the reason for that is he can not, because he has not got the information because he has not got the money.

The other purpose which Mr. Gillen's affidavit serves, your Honor, is to bring into the files of the matter and officially before the Court, the letter which Mr. Avakian wrote to Mr. Campbell, which Mr. Gillen read while in Las Vegas. This is a six-page letter. This transcript we have is the only one available, but we wanted the matter officially before the Court.

The Court: Did you ever hear of a subpoena duces tecum used for the purpose that you are attempting to use one here? Have you ever in your practice before served a subpoena upon an attorney for the government in a case of this kind, or in any criminal case?

Mr. Golden: Those are two different questions, your Honor.

The Court: Well, they are, but it occurs to me that the purpose of this rule is to require the presentation in court by a witness in the trial or to bring into court certain matters that some person has in his possession that you believe to be matters of evidence in a trial, not, as Judge Holmes stated here, for the purpose of discovery.

Mr. Golden: Well, we quite agree, your Honor,

that the purpose of Rule 17 is not for discovery.

The Court: That is what we have here. It is what it will result in.

Mr. Golden: No, I say respectfully, that your Honor assumes that because Mr. Pike—

The Court (Interceding): In your subpoena did you point out any specific document or paper that you want?

Mr. Golden: Well, the answer is no and there was a reason for that. The chief reason is that we do not know what they are.

The Court: “* * * books, papers, documents or other objects designated therein,” that is the language of Rule 17(c) of the Federal Rules. You just name papers, not what papers they are or whose papers they are or anything of the kind.

Mr. Golden: May I then, in view of your Honor's question, rearrange this a little bit and go immediately into the matter of the Bowman Dairy Company vs. United States, and I want to say right now that any decision by any district judge in 1949, no matter how great an authority he may be, is as naught compared to a 1951 decision of the Supreme Court: The law is what the Supreme Court says it is, even if this gentleman did write the rules. He may have intended one thing, but the Supreme Court said he said another thing. The subpoena in this case, your Honor is word for word with the subpoena in the Bowman case, with one exception, and if your Honor will permit me, may I tell you briefly what this case is about.

That was a Sherman Act prosecution and the

United States attorney, or special government prosecutor, was subpoenaed by the defense, the same as here, and also a motion was made under Rule 16, as well as a motion under Rule 17(c). The motion under Rule 16 was granted by consent. The government in that case did not have any objection to giving the defendants the information. As to the motion under Rule 17(c), the government was willing to give the defendant some of the things he wanted, but not all of them. The court points out—we are using different volumes—but the court points out prior to the motion that the government made an offer, which did not include documents "furnished the government by voluntary and confidential informants." Now the district court held the government attorney in contempt. The Circuit Court reversed it, it went to the Supreme Court, and it is true, as Mr. Pike says, that the government attorney was finally not held in contempt, but the reason he was not held in contempt was because the subpoena in the Bowman case called for, sub-section (e), to which Mr. Pike referred, for material "relevant to the allegations or charges contained in said indictment," and I am quoting, "whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants." Obviously we all know, from general practice, that the defendant, despite the rules, is not entitled to get things which the government has which are not evidence or may not be admitted in evidence, so in our subpoena we changed it and our clause (e)

refers only to matters, and I am quoting now: "admissible in evidence either for or against the defendant with respect to any of the allegations contained in the indictment," and then it goes on to say, "including * * *." Now with that exception, which makes our subpoena narrower, because we only call for what is admissible in evidence rather than everything that is relevant, whether or not it is admissible, as is the Bowman Dairy case, with that exception our subpoena is word for word, your Honor. The matter appears in the third paragraph of Justice Minton's opinion. It quotes here as to what it was in the Bowman case:

" 'all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) * * * ''

as Bowman has it:

“* * * are relevant * * *”

as we have it: “are admissible in evidence.”

“* * * to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants * * *”

Now regardless of whether Mr. Pike thinks this is a fishing expedition or any skepticism he may have by reason of his position, inclination or strong belief upon the matter, what does the United States Supreme Court say about that kind of subpoena:

“The defendants had the right to subpoena all materials in possession of the government which were admissible in evidence, including those obtained by it by solicitation or voluntarily by third persons, but the trial court, in weighing production of materials of the latter kind, should uphold protection against disclosures of identity of persons and the method, manner and circumstance of the government’s acquisition of these materials.”

That is fundamental. We do not need to know who gave them or under what duress or promises. We are not interested in that. We are just interested in seeing—if I may read very briefly from the opinion. The court says this:

“It was intended by the rules to give some measure of discovery. Rule 16 was adopted

for that purpose. It gave discovery as to documents and other materials otherwise beyond the reach of the defendant which, as in the instant case, might be numerous and difficult to identify. The rule was to apply not only to documents and other materials belonging to the defendant, but also to those belonging to others which had been obtained by seizure or process. This was a departure from what had theretofore been allowed in criminal cases.

"Rule 61 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. In the interest of orderly procedure in the handling of books, papers, documents and objects in the custody of the Government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial, it was provided by Rule 16 that the court could order such materials made available to the defendant for inspection and copying or photographing. In that way, the control and possession of the Government is not disturbed. Rule 16 provides the only way the defendant can reach such materials so as to inform himself.

"But if such materials or any part of them are not put in evidence by the Government, the defendant may subpoena them under Rule 17(c) and use them himself. It would be

strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production by Rule 17(c)."

And then here we have other documents:

"There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence. The court may control the use of Rule 17(c) to that end by its power to rule on motions to quash or modify.

"It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provides for the usual subpoena ad testificandum and duces tecum, which may be issued by the clerk, with the provision that the court may direct the material designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place

before trial for the inspection of the subpoenaed materials."

Then as a matter of fact, the case it cites will be the case, the district court case, which counsel was reading from this morning, *United States v. Maryland & Virginia Milk Producers Assn.*, 9 F. R. D. 509.

"However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial. There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena. It was material of this character which the Government was unwilling to stipulate or produce or to produce in obedience to the subpoena."

The Court: What were the contents of the subpoena in this Bowman case?

Mr. Golden: You will find that, your Honor, in the third paragraph of the opinion. It says, Mr. Justice Minton:

"Petitioners also moved under Rule 17(c) for an order directing the Government at a time and place to be specified therein to pro-

due for inspection certain other books, papers, documents and objects obtained by the Government by means other than seizure or process. Petitioners filed and served on the Government attorneys a subpoena duces tecum, the pertinent part of which reads as follows:

* * *

And then the following paragraph quotes the subpoena, your Honor.

The Court: What part of that subpoena did the Court declare to be a fishing expedition?

Mr. Golden: Paragraph (c), at the bottom of that paragraph. It is in quotes:

“* * * are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants.”

The Supreme Court said that was invalid and that is why I changed it.

The Court: You may proceed, Mr. Golden.

Mr. Golden: I would like to say, your Honor, that we filed, in connection with this motion, to offset the information which Mr. Pike has and which Mr. Pike had apparently from Mr. Campbell, this information to the effect that we spent about a week looking at these documents. That is the affidavit of Mr. Miller, it is only one page. He works for Mr. Friedman, and the gist of it is that that office, Friedman's office, spent altogether only twelve hours looking at government records,

in which the affiant spent eight hours, and that all they did was to survey it to see what would be required to analyze it and then they gave up because of lack of funds, they were unable to do it.

Now is the first time I heard—of course it is true, but new to me and I think Mr. Pike is misinformed—today is the first time I heard Mr. Semenza had an opportunity to see the material the government has. It is true he saw certain records which he took away, and while I would like to defend myself in that act, I do not suppose your Honor wants to take the time to go into it now, because it is a side issue, but to my knowledge the stuff Mr. Semenza saw is the stuff he took away with him, but he never was given the opportunity, or did he see the material which the government still has. I do not think it is our fault—as I say, I would be glad to defend myself under oath or otherwise—the fact remains, however, that the material which we charge the government has seen and saw for as long as it wanted to and gave back to us voluntarily, that material which they photostated and whatever they wanted to do with it, that belongs to us. It belongs either to the defendant or to his alleged partners or to his alleged employees. It isn't the government's. That is material which is ours and they say, in effect, "We gave you back material that doesn't belong to us, although we got hold of it some way or other, and now you won't give it back to us, so we are not going to let you see it." Well, that is cat and mouse stuff. Maybe they do not trust us and I

submit, your Honor, regardless of that so-called Semenza incident, which I am further prepared to go into, except I do not believe your Honor wishes me to take that time, that we are, under the decision of the Supreme Court here entitled, as a matter of right—and I say this *respectively*—entitled as a matter of right to see this material, under such reasonable safeguards as your Honor may provide. We do not pretend we are entitled to take it away. We do say that we are entitled to see it for the purpose of the case and we are entitled to see what they have used or are going to use or what could be used, either for or against the defendant. I respectfully submit to your Honor, regardless of what has or has not gone before, there is no escape from the plain language of the Bowman case, and again I say this respectfully, regardless of what any man or official may think of the defendant or his motives—and that is not the issue here—the point is that the government says that that rule was made and means this and we are entitled to that under such safeguards as will, in your Honor's opinion prevent it from becoming a fishing expedition. Thank you.

Mr. Pike: Your Honor, in my opening argument in support of the motion to quash the subpoena duces tecum served upon Walter M. Campbell and myself, which I made this morning, I was afforded an opportunity to speak at some length, in the course of which I undertook to analyze, to the best of my ability, the holding of the United States Supreme Court in the Bowman Dairy case,

as well as other authorities cited to the Court. I say again, referring to the cases for authority what it actually holds, that it does not undertake to deprive the trial court of the exercise of its discretion under the particular facts and conditions appearing before the Court as to what would be the permitted course of discovery to the defendant in a criminal case, having in mind the language of the Bowman case itself, as it has been read to the Court several times in the course of this hearing.

Factually, referring to the correspondence of May 15, 1951, letter from Mr. Golden to me in my official employment as United States attorney, he did, of course, make reference to the fact that motion for bill of particulars had been filed and inquired, in substance, what might be accomplished without a court hearing and I did, in turn, discuss that with Mr. Campbell, with the result that nothing was accomplished and there was a hearing had before this Court, at which time motion for bill of particulars was presented and was denied by the Court:

As to the opportunity accorded the defendant through his authorized representatives, Mr. Friedman and Mr. Semenza, to inspect the records in question, I wish to state again to the Court that Mr. Ray Weaver of the Bureau of Internal Revenue in San Francisco is present in the court-room, and based upon information he has given me, in addition to the statements made in Mr. Campbell's affidavit and the representations made

by Mr. Campbell before the Court at the time of the Las Vegas hearing November 15th, it is my understanding that Mr. Semenza was given access to all of the records then in possession of the government at San Francisco, with the exception of what we could properly say the exception of the subpoena here, these narrative statements and the reports of agents and like material, referred to in the Maryland & Virginia Milkers decision as lawyers' work, or some equivalent language, and that the defendant was not only given the opportunity of inspection, but he was given the right to select from the records such records as he wishes to take with him, upon giving a receipt for the same, that he selected what he wished to take with him and that has been the last custody that the government has ever had of those records.

I feel that I have presented the government's contention that this motion to quash the two subpoenas should be granted, and as I have used the language "fishing expedition," it is not my language, as attributed to me by counsel, but it is the language of the United States Supreme Court in the Bowman case. It is not a question of my occupying the position of judge, but I said what the highest court in the land has said in relation to granting any improper discovery in a criminal case as to the evidence proposed to be used by the government. I believe that that concludes what I have to say on the merits of this motion. I do not think that this is the appropriate time to introduce evidence in the form of testimony of Mr. Weaver,

because I think we are getting away from the point governing the legal argument that is sought to be applied to this motion to quash, and I am not going to call Mr. Weaver as a witness, because his testimony will essentially relate to Mr. Semenza's inspection of the records, and that is only part of the matter being considered. However, your Honor, I am obliged to say this, that there is another matter which I must bring to the Court. I feel I may well take up the Court's time to do it.

Mr. Gillen: Let's take up one thing at a time. We would like the motion granted or denied.

Mr. Pike: I understand the only motion before the Court now is the government's motion to quash the subpoenas served on Mr. Campbell and myself. It is not my understanding that the Court consolidated that motion for hearing with defendant's motion to produce, although reference has been made back and forth.

The Court: Aren't they the same in substance; that is, the same matters are involved?

Mr. Pike: Well, I think this might well be true.

The Court: Do you want to argue now on that?

Mr. Pike: No, I do not. I have a matter entirely extraneous.

The Court: Let us take up this and finish that later.

Mr. Pike: Mr. Golden says he wants to say something further and if I understand the orderly procedure on the motion, the moveant makes the opening and closing.

The Court: We have a peculiar situation. We

have argued two motions in the same argument, one side was the moveant and the other side was the opponent.

Mr. Golden: Your Honor, I only want to say these two things. First, I hope your Honor did not get the wrong impression from my closing remarks about the defendant's motive. The position is that because of history, because of having been doing right along, that we did want to say these things in advance in order to say what equally we are entitled to say under oath.

The only other thing I want to say is that by accident Mr. Campbell isn't here, although I feel the matter is as much hearsay to him as to Mr. Pike. We suggest, your Honor, if there is any doubt in the Court's mind as to just what opportunity we actually had to see these records, while it is our understanding that Mr. Weaver was present, both when Mr. Friedman saw these things and when the defendant or Mr. Semenza did, we would like to have him take the stand and answer such questions your Honor has and such questions we have on the subject.

The Court: My view I take in this proposition, I don't see that any testimony would alter the result of my decision on these motions. We had a motion for bill of particulars on April 27th and there was similar discussion. I thought at the time that perhaps maybe counsel could get together and have an understanding as to certain documents and matters which might be in the possession of the government.

Mr. Golden: Excuse my interruption. The defendant is not dissatisfied with what they offered us—they never offered us anything. They told us it was a matter the Court had to decide.

The Court: However, it seems that this subpoena could have been obtained a long time before the day before the trial. Now Rule 16 provides for a method of discovery and inspection of documents, books and objects which have been obtained by seizure or process from the defendant or from any other persons. We have an idea of what the defendant wants to see at this late date, from the affidavit presented here by Mr. Miller. In his affidavit Mr. Miller says that in the spring of 1950 he was taken by Mr. Ray Weaver, a special agent, to a room in San Francisco and shown material which was stated to be records obtained by the Bureau relating to Elmer Remmer, that this material consists of a mass of original documents, such as adding machine tape, bank statements, cancelled checks, dealer's daily reports and daily information, relating to a number of businesses in which Elmer Remmer was alleged to have an interest, that this material filled a packing box of approximately 50 cubic feet in volume, plus several smaller cartons. Now to wait until the day before the trial to have a mass of such material turned over to you for inspection and production, it seems to me would be well within the scope of Rule 17(c), where it states: "The court on motion made promptly, may quash or modify the subpoena if compliance would be unreasonable or oppressive."

We are going to try this case tomorrow morning. How could we examine a roomful of various documents, machine tape, etc.?

The motion to quash is granted and the defendant's motion is denied.

Mr. Golden: May we take exception for the record, your Honor?

The Court: Yes. Defendant's motion for production and inspection of papers and objects is denied; for one reason particularly, that it was noticed here by the defendant just before the trial came on for hearing, the day before the trial.

Mr. Golden: Would your Honor permit me to make one observation of condition which your Honor could impose, which would amply take away the—

The Court: (Interceding) I do not know what you want to say. I read the Supreme Court decisions in this Bowman case and, of course, I am not going to criticize the Supreme Court, but I can't understand how the Supreme Court could seriously consider a subpoena in language like this: "all documents, papers and objects." It seems to me that fairness would require a statement or description of the specific document or book that he might be arranged to see in the hands of somebody else, and as Judge Holtzoff has quoted, "The purpose of this provision (17(c)) is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial." Now if we have to give you a little time

during the course of the trial to examine any document which is offered by the government in evidence, you are going to get that time to examine it.

Mr. Golden: Thank you, your Honor. I thought we could possibly work out a way—

The Court: We are going to take plenty of time to try the case and not hurry along. You can have all the time you need.

Mr. Pike: Before the Court leaves the bench, I am obliged to make an additional statement relating to this proceeding. The Court can appreciate I had no way of knowing what the Court's ruling would be on either of these motions. Your Honor, I feel that at this time it becomes incumbent upon me to invite the Court's attention to a situation that was referred to earlier in this hearing and which, by reason of the most recent development of it, has a very direct affect upon the future proceedings in this case, and I refer to the absence of Mr. Campbell.

This morning when Mr. Campbell was not here, I turned to the Court the only knowledge that I had with reference to his absence. I did that for the reason that he had been subpoenaed along with me by the subpoena duces tecum just quashed by the Court's order, to be here today. I can refer to the telephone conversation I had with Mr. Campbell on the afternoon of Wednesday, November 21st, and my understanding, based upon such conversation, he planned to be in Reno and Carson City Friday, November 23rd. I refer to the two telegrams that had been received by Mr. Brady,

present in court, and who is with the Bureau of Internal Revenue, with headquarters in San Francisco, both of which were signed Walter M. Campbell, the first of which indicated a necessary delay that would cause Mr. Campbell to be in Reno yesterday, and suggesting that Mr. Brady meet him there at that time, and the second of the telegrams suggesting that due to a condition of ill health Mr. Campbell was not able to be in Reno yesterday, but that he would be here today, and suggested again that Mr. Brady meet him. During the noon recess of the court, and in fact just prior to coming in to the courtroom at 1:30, I received, for the first time, another telegram which was sent from San Francisco today, according to the markings on it, late in the morning, addressed to Mr. A. V. Brady, care of United States District Clerk, Postoffice Building, Carson City, Nevada, reading as follows:

“Due to unforeseen emergency can not arrive and therefore request postponement.”

Signed Walter M. Campbell.

Now, your Honor, I might say that this request on the part of Mr. Campbell has been in no way discussed with me. It comes as a complete and altogether new expression from Mr. Campbell and I am stating my position before the Court so the Court will understand the position in which the government counsel finds himself. In the first instance, it is to be noted that I have no reason to consider the telegrams other than a bona fide wire.

I know of no way to communicate with Mr. Campbell except the means that I have tried within the last day or so without success. I do not know the nature of the unforeseen emergence referred to in his wire. I do know this, however, that Mr. Campbell is the regional counsel of the penal division of the Bureau of Internal Revenue and that his official address as such is 100 McAllister Bldg., San Francisco 2, California, at which address I have communicated with him. Similarly I know in my official capacity that he occupies the official position of Special Assistant to the Attorney General of the United States and there is filed with this clerk, pursuant to the authority of the Attorney General of the United States, who is my official superior, a statement designating Walter M. Campbell, Jr. as a Special Assistant United States Attorney for the District of Nevada, which designation, as I understand, is effective for the purposes of this case of United States vs. Remmer. So I now find myself in the position, as United States Attorney, where Mr. Campbell, occupying those official positions, has by this wire directed to Mr. Brady, who is present in court at this time, requested the postponement of this trial.

As the Court knows, I resisted the motion for a continuance of the trial and Mr. Campbell joined me in resisting such motion, at Las Vegas, on November 15th. Mr. Campbell has represented to Mr. Brady in his wires, and I in turn have presented them to the Court, first stating in yesterday's wire his inability to attend by reason of ill health,

and he has now stated his inability to attend due to unforeseen emergency and he states to Mr. Brady: "Therefore request postponement."

Now that is my present position in this thing, your Honor. I know the jury has been summoned, I know the witnesses have been subpoenaed, and I might say a considerable number of those witnesses, as well as jurors, are due to report in this court room at 10:00 o'clock tomorrow morning. If the case is to be postponed, I have brought to the attention of the Court the reasons for the postponement, the request of Mr. Campbell. Mr. Campbell has long been associated with this case. I do not say this in any critical sense at all, but at the motions in Las Vegas I was impressed by those circumstances that, in addition to the representations made to the Court by respective counsel for the defendant and by Mr. Campbell, speaking on behalf of the government, there were many extraneous matters, if the Court will permit me to say so, that in my opinion were not strictly evidence in the case, but they related to the dates of hearings, of conferences, of the exchange in correspondence, and many outlying matters, with which I have no familiarity, but with which Mr. Campbell's personal connection has gone back to a period of years and as a result, your Honor, I find myself in this situation where now this request, which I have no reason to question bona fide emanates from Mr. Campbell, and I am disclosing this to the Court at this time because I wanted to talk to my associates

representing the government and decide just what I should do.

Mr. Gillen: Have you any objection to me looking at that telegram?

Mr. Pike: None at all.

The Court: You have here agents of the Internal Revenue Department, men who have gathered evidence, prepared the case?

Mr. Pike: We have those agents, I believe most of them available, your Honor. I have been asked this question outside court and I have answered it directly, so I see no objection to my making the same statement before the Court, because it is a factual one. When I was asked as to who was going to try the Remmer case, to use the language commonly applied to lawyers participating in a trial, I told them that it was my understanding that Mr. Campbell would handle the greater part of the court presentation of the government's case. Now most certainly that was my understanding and the preparation for the trial has been on that basis, with the understanding, however, that Mr. Thompson and I would likewise participate in the trial.

The Court: By the very meager application for continuance, I am not disposed to grant any continuance, Mr. Pike.

Mr. Pike: I wanted to present the circumstances to the Court and I did not feel I was in position to move for continuance, your Honor, and yet it seemed to me the request comes from a representative of the agency—

The Court: That is why I inquired whether or not you had gentlemen from the Internal Revenue Department who had assembled evidence and participated in the preparation of this case, so we probably can go along with the case.

Mr. Pike: I think that is true.

The Court: It may require a little more time than it would if Mr. Campbell was here, but I can't see any reason why we should continue it. If that is an application for continuance, it will stand denied.

Mr. Gillen: May we offer this telegram in evidence and have it in the court records?

The Court: I would rather not.

Mr. Pike: Mr. Brady is present in court. I asked him to observe very carefully the other two wires.

The Court: I do not see any necessity of putting it in the record. We will recess until tomorrow morning at 10:00 o'clock.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes in case No. 12,177, United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, at the Hearing on Plaintiff's Motion to Quash Subpoena Duces Tecum and Defendant's Motion to Inspect, held at Carson City, Nevada,

on November 27, 1951, and that the foregoing pages, numbered 1 to 55 inclusive, comprises a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, December 17, 1951.

/s/ MARIE D. MCINTYRE,
Official Reporter.

[Endorsed]: Filed December 17, 1951.

[Title of District Court and Cause.]

**ARGUMENTS DURING COURSE OF THE
TRIAL IN THE ABSENCE OF THE JURY**

**MOTION FOR RETURN OF DOCUMENTS
AND SUPPRESSION OF EVIDENCE**

Tuesday, December 12, 1951, 10:00 A.M.

(In the absence of the jury)

Mr. Golden: Your Honor, these matters are with relation to the material which, in compliance with the Court's order, the defendant's counsel deposited with the clerk on Friday afternoon, December 7th, at approximately 1:30, and also other books and records and material which is in the possession of the prosecution. Without reading the list which I read in part yesterday, for the sake of clarity that list is the same list as the list of documents which is contained in the subpoena which was served on Mr. Semenza and I assume that may be considered read, as it is already in the record.

The Court: It may be deemed to have been read.

Mr. Golden: It was already in the record when Mr. Campbell read it. Also, for the sake of clarity, I am leaving out the matter of those three checks which we discussed several times and which Mr. Campbell has—

The Court: (Interrupting) I think I should let the record show the presence of the witness Pechart and he will be ordered to appear as a witness at the conclusion of this argument at 11:00 o'clock or thereafter. You may proceed.

Mr. Golden: Now your Honor will recall that on Friday, after court had adjourned, the government made a request to go through the material which we deposited with the clerk over the week end and we all repaired to chambers, and as a result of the discussion there and some brief discussion of the authorities, your Honor instructed the clerk to keep the material inaccessible to both sides over the week end.

Now as to the material which we deposited with the clerk, which consists of corporate records of the Cal-Neva corporation, we do not claim any legal privilege, other than the fact that that material was not in Mr. Semenza's possession when subpoenaed and therefore the Court's order to produce it is not effective directed to the defendant's attorneys, which Mr. Campbell himself, on page 480 of the transcript, says is entirely improper, but our motion before in regard to those corporate records is a practical one, your Honor. All the defendant's attorneys and accountants are living

in Reno, which is some 30 miles from Carson City. While it is a beautiful day today, the weather at times at this time of the year is inclement and driving after dark is not always as safe as it might be. Furthermore, the night, that is the period of time from adjournment of court in the afternoon until the convening of court in the morning, is not long enough to divide up between the prosecution and the defense and we can't, of course, expect the clerk to keep his office open all night, but it is necessary for us to see those records frequently and sometimes every night.

Furthermore, as the record does already show, your Honor, the government had these records for a period of time sufficient to enable them to take copies and we believe that they have taken copies, and if they have not, we say that they were dilatory in not calling for the records before the trial began. Now those are the practical questions as to the corporate records.

Now as to the non-corporate records, in addition to the practical questions, we say that they are legally privileged and I now move the Court in the following respects: as to the records and materials which we deposited with the clerk on Friday afternoon last, we move the Court for the return of that material and also for the suppression of its use in evidence by the government.

Mr. Campbell: Is that a separate motion?

Mr. Golden: Yes. There are two separate motions. We move for its return and we move the

Court to suppress its use in evidence by the government.

As to the material now in possession of the prosecution, which was seized, was taken by the Internal Revenue agents from persons whom the government claims to have been partners or agents or employees of the defendant, or from places in which the government claims the defendant to have been a partner or sole owner, we likewise make two motions; one, for the return of that evidence to us, and the other to suppress its introduction in evidence by the government.

Now in support of those motions, if the Court please, we start out with the element and proposition that a subpoena duces tecum or a court order for direction of documents may constitute an unreasonable search and seizure and, of course, there is no distinction really between a subpoena and a court order. A court order is actually a subpoena. Authority for the proposition that a subpoena duces tecum or court order may constitute an unreasonable search and seizure is the case of *Hall vs. Hinkler*, 201 U. S. 43. It would be equally error for the prosecution to call for the defendant to take the witness stand and the Court's order of the 6th of December, requiring the production of his records, is in the same category.

Now we offer to prove, your Honor, through the testimony of witnesses, that the government's acquisition of these records—that is both those on deposit in court and those that we say they still have in their possession—and the government's re-

tention of those records and the government's demand for the records which they gave back to us under a condition which they had no right to impose, namely, that we would return them when they wanted them, constitute unlawful search and seizure under the Fourth and Fifth Amendments to the Constitution of the United States. The Fourth Amendment provides that: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

The Fifth Amendment provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself."

Now the record is clear, your Honor, and we offer to make it more clear if it is not, by producing evidence of witnesses, that these records, that is, both those with the Clerk and those which the government still has, are the defendant's own property and that he is entitled to them under authority of the decision of the Supreme Court in *Bowman Dairy Company vs. United States*, with which your Honor is familiar, because that was our authority on the motion made on the 27th of November and that decision was followed, incidentally, in the United States District Court of the Southern District of California, Hon. Ben Harrison judge, in the case of *United States vs. Capri*, 21992-Criminal. We have the transcript of his decision here, which is a District Court decision, your Honor, in the Southern District of California, Judge Ben Harrison, 21992 Criminal, and the de-

cision was on December 4, 1951. I have here an official certified transcript of Judge Harrison's decision, which I would be very glad to leave with the Court.

Now the papers we are talking about, your Honor, are not the corporate records, which the courts have held are not privileged because a corporation is not a person within the Fourth and Fifth Amendments of the Constitution which I have quoted, nor are they records required to be kept by law, which the courts have held are really public records, in which the government has an interest and which the government has a right to inspect, such as OPA records. The OPA cases go along on the point that sellers, merchants and those who were subject to the OPA regulations, were licensed by the government and as part of their license they were required to keep these records and they really are official public records, but the papers which we are talking about are papers which the government not only admits, but insists are the defendant's private papers. Under the Internal Revenue laws the only requirement is that a taxpayer, or potential taxpayer, keep such data as will enable him to determine his income and will enable the government to verify it. He can keep it on scraps of paper, it could consist merely of a cash register tape and a check book, any record would suffice, there is no requirement under the Internal Revenue laws that any particular kinds of books or records should be kept.

Now I refer your Honor to page 396 of the

transcript to this statement by Mr. Campbell, and I am quoting:

"To be perfectly fair about the situation, it is the contention of the government that all of these various enterprises which, with the exception of Cal-Neva, Inc., which is a corporation, were partnerships, in which the defendant here, Elmer Remmer, was a partner, and in that respect they are the personal records of the defendant, Elmer Remmer. They were not originally obtained by the special agent from the defendant, Elmer Remmer, but were obtained from third parties. I feel it is only fair that that statement be made to the Court."

That is Mr. Campbell's very fair statement. So these are private records of the defendant, and on page 408 of the transcript Mr. Campbell makes an equally fair statement. He says:

"Mr. Golden knows it would be highly improper to serve subpoena on him as the attorney."

Now, your Honor, the interplay of these two great fundamental American constitutional provisions, namely, the protection of the privacy of the individual and the protection of the individual against compulsory production of evidence to be used against him, resulted in what is here called in law the doctrine of searches and seizures, which is so well epitomized in the leading case which we presented to your Honor on Friday afternoon in

chambers; namely, *Boyd vs. United States*, 116 U. S., 616; 29 L. E. 746, and at page 751 of the Lawyers Edition the Supreme Court says:

“Any compulsory discovery, like compelling of production of his private books and papers, to convict him of crime or forfeit his property, is contrary to the principles of a free American government. It is abhorrent to the instincts of an Englishman. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it can not abide the pure atmosphere of political liberty and personal freedom.”

Now in an annotation covering that case, which appears at Vol. 207 of U. S. at page 541, the following appears in better words than I have at my command:

“In the leading case of *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, Sup. Ct. Rep. 524, it is held that it does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the 4th Amendment, but a compulsory production of a party’s private books and papers, to be used against him or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment.

“The question remains, when such compulsory production may be regarded as unre-

sonable. It is remarked in the foregoing case that there is an intimate relation between the provision of the 4th Amendment that 'the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated,' and the provision of the 5th Amendment that no person 'shall be compelled, in any criminal case, to be a witness against himself;' the court saying: 'They throw great light on each other.' For the 'unreasonable searches and seizures' condemned in the 4th Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which, in criminal cases, is condemned in the 5th Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the 5th Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the 4th Amendment. And we have been unable to perceive that the seizure of a man's private books and papers, to be used in evidence against him, is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form are in their nature criminal.

"A like idea has been expressed by other courts, and the general principle may be accordingly deduced that a compulsory production of private books and papers is unreasonable where it substantially compels the owner to furnish evidence which may be used against himself in proceedings of a criminal or quasi-criminal character."

Now, your Honor, the prosecution undoubtedly will advance the argument, which it already has advanced, that since it had those records at one time, the defendant has lost his privilege. We point out, of course, that the prosecution's testimony has not contended that the defendant personally ever waived his privilege or personally delivered any of these records to the government or personally authorized their delivery to the government. As a matter of fact, in chambers on Friday Mr. Pike expressed grave doubt as to whether the defendant's absence could be waived by his counsel or had to be waived by the defendant personally and where we are here, where we have a constitutional right, it would have to be waived by the defendant personally. The fact is, that the demand for these records by the government indicates that they hope to use them, or information gleaned from them, against the defendant. Now two wrongs do not make a right, as we all know. It was wrong for the government to take those records in the first place, because their only right under the statutes is to inspect them.

The Court: I think we can agree, can't we, Mr. Golden, up to this time, in view of the order that was made in chambers, that the records deposited in the clerk's office, pursuant to the order made the other day, have not been examined or the contents of them divulged to the government's counsel?

Mr. Golden: I believe that is correct, your Honor, yes.

We offer to prove, through the evidence of witnesses, under Rule 41(e), which requires the Court to take such evidence as is necessary to determine whether or not they have been acquired under unreasonable search and seizure, that the government's taking of those records in the first place was wrong and under the authorities here it is wrong for the Court to order us to deposit them in court for the prosecution's inspection and use in evidence.

The Court: You may present such evidence.

Mr. Campbell: I would like to be heard briefly before the evidence is presented.

The Court: All right.

Mr. Golden: The Court itself stated, when charging the jury here, a fair trial is the bulwark of America and I would like to read to your Honor one brief passage from the case in which the opinion is written by Judge Learned Hand, a very learned judge of the federal court, *United States v. Coplon*, 185 Fed. (2), 629, at page 638. Judge Hand says:

"But we can not dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom, and is on the path towards absolutism."

Now, your Honor, we ask to present evidence here which, in connection with the acquisition and retention of all of these records by the prosecution or its agents, and under the ordering of that evidence, we ask your Honor to quash the court's order of December 6th and to return to the defendant the material now on deposit with the clerk, and likewise to order returned to the defendant the re-

mainder of his personal private papers which the government has in its possession, and to suppress the use by the government in evidence of any of the material deposited with the clerk or any of the other property of the defendant which the government has in its possession. And I understand that before your Honor hears the testimony Mr. Campbell expressed a desire to be heard, your Honor.

The Court: Yes. I think the record makes it clear, does it not, that the order made the other day, ordering the defendant to deposit the records with the clerk, was made pursuant to a motion by the government?

Mr. Campbell: Yes, your Honor. The government requested that the records called for in the subpoena served upon Lawrence Semenza be produced. A hearing was held, at which time Mr. Semenza identified himself as an accountant for the defendant and that he had been an accountant for him for many years. He testified that he held, and had held for a number of years, the power of attorney of the defendant, authorizing him to represent the defendant before the Treasury Department of the United States. He stated in his testimony that pursuant to his employment he had gone to the Bureau of Internal Revenue, whom he knew to be in possession of certain records, and had asked for their use in connection with certain phases of his employment. At that time he was permitted to take away with him whatever books and records pertaining to those matters which he

deemed useful in his work. At that time he wrote, in his own handwriting, and that was produced here in court in evidence, a memorandum setting forth or listing the various records which he took with him. On that occasion he testified that he agreed to restore those records to the Treasury Department whenever their need should appear. Subsequently, he testified, an additional account was secured for the defendant, one Nathan Friedman of San Francisco; that he delivered these books and records to Mr. Friedman, who also held, as I recall, a power of attorney from the defendant, Elmer Remmer. Subsequently Mr. Semenza was called upon, first orally, to produce such books and records in contemplation of the grand jury proceedings in this district. He stated that he made an effort to them, but found that they had been delivered by Mr. Friedman to the attorney, John Golden, who at that time, as I recall, was in the military service on annual maneuvers, or whatever they might be, but that he discussed the matter with another of Mr. Remmer's attorneys, Mr. Avakian, who advised him that he had not had an opportunity to go through the records. Subsequently, a subpoena was served upon Mr. Semenza to appear before the grand jury and produce those same records which were set forth in his receipt and which he had promised to return. He appeared before the grand jury without the records and according to his testimony gave substantially the same statements, that they were beyond his control to produce.

The evidence then goes on to show, and was produced before the Court, that subsequent to the grand jury proceeding, at which time Mr. Semenza testified, that is before the grand jury as well as here in court, that the records were not in his possession, the records were restored to Mr. Semenza's possession and remained there in his possession until approximately, according to Mr. Semenza, a week prior to the time that the subpoena to produce those records in this court was served upon him. At that time he stated the books and records were delivered to the office of Mr. Lohse, a Nevada attorney and counsel in this case, who had just been associated within a few days' time, as local counsel for the defendant Remmer, and that the records were at that time in the office of Mr. Lohse where, I believe he testified, he was performing his work as an accountant for the defendant. So much for what the record shows in that regard.

Now Mr. Golden proposes two motions; that is, the return of the material and the suppression of the use of that material in evidence. Inferentially, at least, his motion would also include the use of secondary evidence obtained from inspection of those records. Since his motion is made upon the ground that the records were originally obtained through an unlawful search and seizure, he states that he bases his motion under Rule 41(e) of the Rules of Criminal Procedure. If I may, I will read that rule into the record, Rule 41(e): (Reads)

We are not concerned here, of course, with the issuance of a search warrant, so that if any of the

grounds are applicable here, it would be ground (1), that the property was illegally seized without warrant. Continuing to read: "The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property should be restored unless. . . ." Now the last sentence, to which I particularly direct the Court's attention: "The motion shall be made before the trial or hearing, unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Now the law has been clearly established, through numerous cases, that a motion to suppress evidence, as having been illegally or improperly obtained, must be made at the first opportunity. It must be made at the time that the defendant first becomes aware that the evidence has so been obtained and that it is proposed to use such evidence against him. There have been some eight months elapsed since the indictment in this case. There have been several years elapsed since the material was in the possession of the agents of the government, to the knowledge of the defendant and his representatives, because they called upon the representatives of the government, through the instrumentality of Mr. Semenza, to obtain access and inspection of these various records.

Now if there were, and if there have been, any illegal obtaining of these records in the first instance, a timely motion should then have been

made even prior to the indictment, but in the very latest point of time immediately after the indictment, to suppress evidence which the government had obtained, either by obtaining certain of the books or records, or to suppress evidence which they obtained by means of an inspection of those books and records, and I think the law is extremely clear in that connection.

The Court will recall that there have been several hearings with respect to these books and records and yet, for the first time and upon the trial of this case, counsel now seeks to raise the question of the original taking. There was no such claim made. For example, at the hearing at Las Vegas, when other records, which were obtained at the same time, under the same procedure, under the same method as those which are now deposited with the clerk were obtained, but which apparently were not considered by Mr. Semenza material for his examination, no such claim was made in behalf of the defendant that those records, which they sought to inspect, were illegally or improperly obtained by the government.

By making this argument, I do not mean to concede in any fashion that the government did not obtain these books properly and with the full consent and the willingness of the party who turned those records over to them in connection with their examination of the income tax liability of this defendant. As counsel has stated, the law requires that a taxpayer maintain such books and records as will adequately show his annual income for

accounting purposes. It is true that the law does not require any particular kind of books, does not require double entry system or single entry system or even a formal set of books, but the law does require that a taxpayer keep such records as will adequately set forth his annual income for accounting purposes, as counsel says, so that the government can verify the correctness of his returns.

Now it had been my—

The Court (Interceding): Do you maintain that the records kept by a taxpayer are in the same category and would come under the same rule as OPA records?

Mr. Campbell: No, your Honor, and in that connection I am going to refer to a 9th Circuit case, but I do say once the taxpayer, either directly or through his agents, has made those records available to the government, or they have become available to the government through third parties, and the taxpayer, through his failure to assert any rights which he might otherwise have had, fails to take proper steps to obtain the return of those books and within a reasonable period of time, as set forth by the cases, then he has estopped any connection with those books because they have become books of account between him and the government.

In that connection, I wish to refer your Honor to a case in this circuit—before calling attention to this case, I might state counsel has referred to the Capri case, in which some motions were decided this month relating, I believe, to the inspec-

tion of records, by Judge Harrison. I have not seen the transcript of that hearing, but I do know this to be a fact, that the motions made in that case were made promptly after the indictment. The indictment in that case, I do not believe, is 30 days' old and the motions I know were pending prior to the commencement of this case.

Now regarding the 9th Circuit case of Levin et al. vs. United States, reported at 5 Federal (2), 598. I might state to your Honor that this case, and several other cases upon which we rely, have been set forth in a memorandum which I wish to hand to the Court and will at this time hand counsel a copy. In this case of Levin the Court states:

(Reads from memorandum through first paragraph page 3 of memorandum.)

The Court then goes on to review the cases of Internal Revenue Agent v. Sullivan and United States v. Cooper, and finally under point (8) gives this statement:

(Reads page 4 of memorandum under (8).)

Now I also wish to direct your attention to the following case, that of Greenbaum vs. United States, 280 F., 474, a 6th Circuit case, which more nearly approaches the situation here than any case which we have been able to find. In some respects we are meeting a very novel situation, where the defendant's representatives, through promises which they either did or did not intend to perform at the time they were made, secured these books

from the government, but at any rate, whatever the original intention was, when the time came for performance, the person making the promise had either placed himself in or had been placed in the position by others of having to say that compliance with those promises had been put out of his ability by his co-counsel or co-attorneys.

The Court: I think I will have the jury come in and excuse them so they won't have to sit around the hall.

Jury returned into court, admonished and excused until 1:00 p.m.

Mr. Campbell: Now in the Greenbaum v. United States case, 280 F., 474, apparently a contention was made by the prosecution of a similar situation which existed there, but the evidence fell short of establishing it, as it had in this case. Reading from page 478 in that case, set forth at the bottom of page 4 of the memorandum: (Reads from memorandum through line 1 on page 5.)

Now stop a moment. The evidence, of course, here shows, under oath of Mr. Semenza, that they were delivered to those holding the power of attorney, or to Mr. Semenza holding power of attorney, of Mr. Remmer, under promise to return. However, in this Greenbaum case it was simply a statement made by the District Attorney that he had been informed by somebody else. (Continues reading through line 5.) Again the evidence in the Greenbaum case has fallen short of that which is here. (Continues reading through line 8.) So I state, your Honor, the showing there fell far short.

They were unable to establish that a promise had been made for the return of the books by the representative of the defendant, but here the showing is clear. (Continues reading through line 11.) I will not read into the record at this time the balance since I have handed your Honor memorandum stating further statements.

The Court: Does that statement of facts in that case show or refer to in that last sentence: "If a court has any power to make such an order as was here made, it should be exercised only where there is no doubt as to the facts," does the decision disclose what the nature of that order was?

Mr. Campbell: Yes, the court very simply, upon a statement of the District Attorney and without being able to substantiate it by proof that any such promise had been made, ordered the books produced and was there held to be error that he had done so and this decision which I have read to your Honor is pointing out the insufficiency of the showing which was made before the Court in that connection.

We have also cited to your Honor in government's memorandum, and which I will not at this time read into the record, inasmuch as it there before your Honor, the case of *Mellett vs. North Carolina*, 181 U. S., 589 and the case of *United States vs. Amorosa*, 167 Fed. (2), 596, a case of the 3rd Circuit.

Now the government's contention boils down to this: In the first place, the motion of the defendant regarding the suppression in evidence of these books

or, if it be inferred that there also be included in that motion secondary evidence as to their contents, is not brought timely. The defendant had it in his power from the first instance that he learned that these books and records were in the possession of the government, to have made timely motion. He knew it at the very latest in 1949, I believe it was, when Mr. Semenza called upon the Internal Revenue with respect to these records, as the representative of the defendant, and obtained them upon his promise to return. The very latest possible that that it would seem reasonable within which to have brought a proper motion would have been not later than the return of the indictment in this case, and yet some eight months have elapsed.

Further, while motions were made for inspection, both in Las Vegas and immediately prior to the beginning of this trial, no question was raised regarding the obtaining of the other records which are within the same category as these records referred to here.

Further, we believe, in the language cited by counsel from the Supreme Court case of *Boyd vs. United States*, 116 U. S., where the language is used that certain matters are abhorrent to the instincts of an American, we think the situation here presents a similar situation. If the books and records were returned to Mr. Semenza, if the promise made was made in bad faith, which I do not contend, your Honor, but if it was made in bad faith, that is important, and if their return was refused in bad faith, certainly that is important.

The Court has made final orders with respect to the motions for inspection heretofore made, so that the last final order of this Court was the order to the defense counsel to deliver these same records, which were called for on that receipt, to the clerk of the court and which order, of course, has been complied with by counsel. So that as I see our problem, it is only in the nature of any problems which may have arisen since Friday, when the records were deposited. It is the government's position that under the circumstances, and under the somewhat peculiar circumstances of this case, it is entitled to full inspection of the records, but more important to their use in evidence in this case, and in the alternative, if for any reason the Court should conclude that the records themselves are beyond the reach of the government, then the government is entitled to produce secondary evidence as to the contents of those records. I submit, however, that with the records, the best evidence, being available and under the facts and circumstances of this case, that those records should be made fully available for inspection and use of the government in this case.

Mr. Pike called my attention to the fact that included in the motions of defense counsel was a request that evidence be taken going back to the original circumstances under which the records came into possession of the government. Now we presume that such matters, of course, were in the mind of the Court at the time the other orders in this matter had been made, both as to the inspec-

tion of the records which are still in the possession of the government, to which counsel has referred, and with regard to these particular records within or at any seasonable time to raise these points, should clearly preclude the necessity of taking of the time of the Court as to going into those matters at this time.

Mr. Golden: If the Court please, if I may answer briefly Mr. Campbell.

In the first place, as to the timeliness of these motions, as Mr. Campbell himself points out, the defense made three motions prior to the beginning of the trial in this case, under respectively Rules 7(f)—that was for bill of particulars, 16, and 17(c). All those motions were denied.

We do not know, and never have known, just what it is that the government has in its possession, other than the records, of course, which were returned with Mr. Semenza and which were deposited with the clerk. What else they have, we don't know. This all addresses to the timeliness of this motion.

As to the records which were deposited with the clerk, Rule 41(e), which Mr. Campbell read, contains the sentence to the effect that the motion may be made at the first opportunity after the defendant becomes aware of the situation. That is down toward the bottom of the section.

Now to take this thing up chronologically—at the time Mr. Semenza was supposed to go before the grand jury with these records and at the time Mr. Campbell states I was on temporary active duty with the United States army and Mr. Se-

menza got in touch with Mr. Avakian—this is all in the record, your Honor, it is not a gratuitous statement, it is in the record from the motion made at Las Vegas—Mr. Avakian advised Mr. Campbell as follows: that he did not know the names of the third parties from whom Mr. Weaver obtained the records or whether they were obtained in rightful procedure by law; furthermore, he did not know if they were returned to Mr. Remmer or some other party on the part of Mr. Remmer; furthermore, since Mr. Remmer, as the owner of the records, was entitled to them at all times anyway, the government at most had the right of inspection and not possession, and accordingly any condition exacted by Mr. Weaver from Mr. Semenza, acting without the knowledge or consent of Mr. Remmer and his lawyers, was of no legal effect.

Now it will, I am sure, be stipulated to be a fact here that some of these records, and particularly the ones on deposit with the clerk, were obtained by Internal Revenue agents from a man by the name of Maundrell, who years ago went to Honolulu to live and who is still living there and who has been here as a witness subpoenaed by the government since the beginning of this trial, and that is the first time that we were able to learn that he is the one from whom the government got these records. The matter of the timeliness of the motion, your Honor, is in the discretion of the Court, as far as the records are concerned, which are still in the possession of the government. If those records were obtained improperly or if their retention is im-

proper, which we offer to show by evidence, it is not for the representatives of the United States to say that we did not complain about it soon enough. Any discretion your Honor has in the matter certainly should be exercised, the benefit of any doubt should be given to the defendant, who is raising these constitutional questions, but as to the records which are on deposit with the clerk here, our contention is, your Honor, that not only were they originally taken with a promise on the part of the agents—and we expect to show this through testimony—on the part of the agents to return them whenever called for, which is an antecedent promise to this promise, but also it is our contention that the Court's order itself does—and we say this respectfully, of course—itself constitute a violation of the defendant's rights under the Fourth and Fifth Amendments of the Constitution. That was only a few days ago, that was on Thursday, and on Friday we told the Court we wanted to present these matters and they were tentatively set for Monday and for the reason other matters occurring, they did not go on and today is Wednesday morning. There is nothing dilatory about that.

Now it appears to me Mr. Campbell's contention, from the authorities he presented here, that while ordinarily the prosecution is not entitled to private papers of the defendant, it is so entitled in this case because of the promise made by Mr. Semenza. That appears to be the gist of the matter, and he refers to the fact that Mr. Semenza was under power of attorney executed by the defendant. Well now we

have for consideration, your Honor, the constitutional rights of the defendant. He personally must waive a trial by jury. He personally must waive any of his rights under the Constitution. Now if Mr. Campbell's logic is correct and if Mr. Semenza, or any other person acting under power of attorney, had said to the representatives of the government, "Mr. Remmer, the defendant in this case, is going to take the witness stand"—parenthetically may I say we do not know; whether he is or not depends on the case the government is putting on, I am not making any conclusions whether he will or not take the stand—if Mr. Semenza, under power of attorney, had promised that Mr. Remmer was going to take the witness stand, could the prosecution call for him to take the witness stand? Of course it couldn't. And so Mr. Semenza's promise, which we assume was made and which was made in good faith—in the first place, in consideration, as pointed out, by the fact originally the government promises to return the material to the person from whom they took it—Mr. Semenza's promise cannot waive for the defendant the Constitution of the United States, and we offer to show, as I say, the conditions upon which this material was obtained originally by the government. Like any case, like a title company, with the question of whose property this is in dispute, they go back to the beginning and they start in with the original title and they trace it back.

Now Mr. Campbell's third point, as I understand it, is this—that the government has secondary evidence of this material and he says if in-

ferentially the motion is to suppress the use of that secondary evidence—well, I don't just follow, but in any case our motion here, your Honor, is for return of those books and for their suppression of use in evidence. If secondary evidence is offered by the government on the ground that the original evidence is not available, if it meets other tests, if it is competent material and relevant, and if secondary evidence was not obtained unlawfully it would be admissible, we are not asking your Honor at this time to rule that the government could not put into evidence, or offer into evidence, secondary evidence of those records in there. We are asking for the return of those records and be confirmed in our possession of them, so that we may use them and have them and if the government produces secondary evidence and it develops they got it lawfully and it is material and relevant, it goes in, but we say to your Honor we start out here with the fundamental propositions laid down by the Constitution and if they are to be whittled away, they are not to be whittled away by a promise made by an attorney in fact, even in good faith, and I repeat, your Honor, that we offer now to show the circumstances under which this material was originally obtained, including the fact that when obtained the persons who obtained it promised to return it to us, and we wish to call several witnesses on that point.

The Court: Now that raises a suggestion. No notice was given to the government whatever—

Mr. Golden: Notice of what, your Honor?

The Court: Let me proceed.

Mr. Golden: Oh, excuse me.

The Court: ——of any intention to call witnesses. In other words, they have had no opportunity to prepare to meet the testimony of any witnesses who might be called at this time. There is no notice in this application that was given. It didn't appear from anything that was said in the oral motion, the oral motion having been made at this time. I could see if this request was granted, it could very likely result in a delay of this trial. I will deny that portion of the motion as coming too late.

Mr. Golden: May I interrupt your Honor? I just want to understand.

The Court: Yes. I deny the request to have evidence taken at this time as to the original custody of the books by the government or Internal Revenue Department.

Nothing has been suggested in any of the motions heretofore filed that would indicate an attack upon the government's right to have these records in its possession, an attack based on illegal search or seizure. Now the Greenbaum case lays out a pattern that I think we could follow here. There is no doubt here but there was a promise to return these books to the agent whose name was Mr. Weaver.

The motions of the defendant are denied. All motions are denied.

Mr. Golden: May I point out to your Honor

that in our opinion the section of the rule, the sentence which says: "The judge shall receive evidence on any issue of fact necessary to the decision of the motion," is not a discretionary matter, but mandatory.

The Court: But I do not believe it is necessary to hear the evidence at this time. The motions are denied on all grounds.

Mr. Golden: The government did not raise the point they had to have notice. May I also point out in the Greenbaum case and all the cases, the defendant personally made voluntary delivery to the trustee. The essence of this case is that the defendant has not personally waived his rights.

The Court: The motion is denied and we will be in recess until one o'clock.

Thursday, December 13, 1951, 10:00 A.M.

(In the absence of the jury.)

Defendant present with counsel.

The Court: I understand, Mr. Golden, you have a matter you would like to present.

Mr. Golden: Yes, I will be very brief.

Your Honor, I would like to make the motion and state what it is to your Honor. I won't argue it unless your Honor wants argument, because the argument would be substantially as to the motion yesterday, and I assume from your Honor's ruling yesterday that your Honor will deny the motion, but I want to place the motion in the record.

The motion, your Honor, is in connection with the testimony of the persons who have testified and introduced evidence regarding expenditures of the defendant, and I will just name them briefly without commenting on them. There is Shreve & Company, the witness Bray; Bullock & Jones, the witness Gillingham; the New York tailor, the witness Greenhouse; Stanley Furniture Company, the witness Hill; the contribution to the campaign in Alameda County, the witness was Mr. Murphy; Sulka & Company, the witness McCaffery; Franklin Hospital, the witness Oglesby; the insurance brokers, Tinneman, Bridgeford & Rainey, the witness Scollin; and the Blackstone Hotel, the witness was Mr. Strong.

Now it came to our attention over night, your Honor, that the information which led to the use of the testimony in evidence of those witnesses by the government came from papers which were taken by the government agents, the Internal Revenue agents, and we offer to show by evidence that those papers were illegally taken and retained and we move to strike out the testimony of those witnesses and the evidence introduced by them and to suppress the use of the records introduced by them and any other records which are based upon information so obtained, and particularly the evidence of the hospital bill; for this reason, your Honor, the government, we submit, finds itself upon the horns of a dilemma here. Either these expenditures are business expenditures, in which case they do not enter into a net worth case, have no bearing on the issues here, or else

they are personal expenditures, non-business expenditures of the defendant, in which case the government, even more clearly than with regard to the record that we talked about yesterday, has no right to take the personal papers or retain the personal papers of the defendant. In other words, while a man is required to keep books or some data which shows his income, there is no requirement saying that he keep any account of his personal expenditures, when he buys a car or when he is sick in the hospital, or whatever it may be. We say the government is in that dilemma—either they contend that these matters are personal, in which event they had no right to take the information, got illegally, and under the well-known rule they can not use evidence illegally obtained, or the expenditures are business expenditures and do not enter into the case and are incompetent, irrelevant and immaterial. As I say, I won't argue the authorities in the matter, but we make that motion and we offer to prove, in support of that motion, that these personal records were illegally taken and illegally retained.

Now I just want to say this, your Honor, the records I am talking about now are not any of the records which were delivered to Mr. Semenza and which Mr. Semenza promised to return to the government. These are records which have never been returned to the defendant or any of his representatives, which we have never seen, which we tried to see by means of the three pre-trial motions which were made here, and as I say, these records were obtained from people who had

them, third parties who are named so far, without the defendant's consent or without his knowledge.

If I did not make myself clear, I offer to place witnesses on the stand who will substantiate by their testimony what I said.

The Court: I want to ask you a question or two, Mr. Golden. The basis of your contention now made, and the basis of the motion you have made in regard to the various records you mention here, is the same, that is, they arise out of the 4th Amendment.

Mr. Golden: And the 5th Amendment, your Honor.

The Court: You say that the use of these records or information derived from them would violate the provisions of the Constitution which reads: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated" and so on.

Mr. Golden: And the 5th Amendment.

The Court: Well, let us take this one first. The 5th Amendment that you deem applicable here provides that "No person shall be compelled in any criminal case to be a witness against himself."

Mr. Golden: Yes, your Honor.

The Court: The records themselves, assume that they were brought into the custody of the government without a violation of the 4th Amendment, there is no question but what they would be admissible in evidence?

Mr. Golden: Well, you are assuming something, your Honor, which by the evidence—

The Court (Interceding): I want to take the thing as we go along. Let us assume now—I want to get your position if I can—start off this way, let us assume—I would like to have you argue if you want to; of course, you do not have to if you do not want to—let us assume that these records were properly in the custody of the government, the records of the defendant, of his accounts and checks and various books of the various business enterprises, particularly those which were conducted on a partnership basis. In that situation there would be legal objection to the introduction of evidence against him. Now I notice in the decision by Judge Hand, *United States vs. Kelly*, 55 Fed. (2), where in the syllabus we find this statement: "In trial for assisting and preparation and presentation of fraudulent income tax returns, taxpayer's books shown to have been kept in due course were competent evidence under the statute, though made before enactment thereof and subdivision, providing that section as a whole shall not be retroactive, does not require that documents kept in the regular course * * *" That is the general rule of evidence in Title 28 which is by the federal rules made applicable to criminal cases. Now records kept in the ordinary course of business of this defendant, I understand are admissible against him in evidence, unless they are procured as in violation of the search and seizure provision of the Constitution of the United States,

the 4th Amendment. Now is there any fault to find with that statement of law?

Mr. Golden: May I ask your Honor a question. Is your Honor talking about business records, for example, of the Franklin Hospital—

The Court: No, I am talking about the business records of Mr. Pechart and the other gentlemen and this defendant in the 21 Club, in these various enterprises in which there is a partnership, but your argument ties in with all the other propositions you go back to of which you claim disregard of the 4th Amendment.

Mr. Golden: Well, of course, your Honor, the records which are properly kept, that is to satisfy the ordinary foundation, kept in the course of business, if they are legally obtained, without violating any of the defendant's rights, of course they are admissible.

The Court: In other words, if records, we will say, were against Mr. Remmer, could be introduced against him, records obtained of his business ventures which are the subject matter of this inquiry—

Mr. Golden: I am not contending that the prosecution cannot introduce evidence against the defendant, that would be foolish, but if your Honor assumes that the evidence—

The Court (Interceding): I am just assuming that for the purpose of getting an answer to that question. I want to see what foundation we are on here. I want to see what these rulings I have been making could rest on.

Mr. Golden: Well, I have to distinguish, your

Honor, between the records we were talking about yesterday and the records I am talking about today. Taking up first the records I was talking about yesterday—if it be assumed for the purposes of this discussion that they were properly obtained and properly retained and that their acquisition and use by the government did not violate either the 4th or 5th Amendments, and if the records were otherwise admissible, then, of course, there is no question about it, but that, of course, assumes the whole question.

Now as to the records I am talking about this morning, your Honor, to give a concrete example, the Franklin Hospital man, Mr. Oglesby, comes here with a ledger to show how the Franklin Hospital kept them in the ordinary course of business, and so on. There is no question, apart from constitutional provisions and the law built around them, that that record is admissible, but our point is that the prosecution learned that the defendant had been a patient at the Franklin Hospital by unlawful seizure and retention of either a check or a statement or some paper which gave them that information, and of course your Honor is familiar with the recent cases of the Supreme Court which hold that there comes within the protection of the Constitution not only actual evidence, but information which will give the prosecution a lead to the evidence.

The Court: I understand, but let me ask you another question. I notice there is a case in 77 Fed. (2), Eaker vs. United States, which holds

that when articles of business are produced by an officer there is an assumption that they are properly in his possession. Now you just make a motion here right out of the clear blue sky, that perhaps they didn't get these records properly. You do not make a statement of offer or anything of that kind. You just say you offer to show. You want the Court to have an inquiry here that is collateral, outside of this trial. Read this Adams case and some of these New York cases. The Court is not required to stop a trial and go off on a tangent on investigations such as you propose here.

Mr. Golden: Well, I respectfully disagree with your Honor, but—

The Court (Interceding): Well, let's look at the case; I can get that in a minute.

Mr. Golden: I say under 41(e) of the rules, the Court must take evidence and we can always make an offer of proof. I will be glad to make a statement of what we expect to prove to your Honor, if you permit me.

The Court: I would like to know just what you expect to prove.

Mr. Golden: All right. We expect to prove that these papers that we talked about yesterday and are talking about today were taken by the agents of the prosecution, or the Internal Revenue Service, from third parties, not from the defendant; were taken without the defendant's consent or knowledge; were taken under a promise by those agents to these third parties, to return those records upon demand, and notwithstanding that prom-

ise ever since, in the face not only of informal demands, which were in the record, from the exchange of correspondence between Mr. Avakian and Mr. Campbell, but in the face of formal demands, by reason of those three pre-trial motions, they have refused to perform, and we offer to show further that some of the papers so taken were the records of expenditures we are talking about this morning.

The Court: Now I have Rule 41(e) of the Rules of Criminal Procedure. (Reads rule.) Now that is the reason why it is brought here in this court; otherwise it would properly be brought in the California jurisdiction.

Mr. Golden: Yes, your Honor.

The Court (Continuing): "Motion shall be made before the trial and hearing unless * * *" Now I have heard several suggestions from counsel that there is something wrong about the manner in which these records were obtained and it appears in the first place, from the testimony of Mr. Pechart himself here yesterday, that the government was given full access to all these records; in fact, they went so far as to provide a convenient place for the agents of the government to work on these records, and they were delivered to two agents by Mr. Pechart. Then subsequently Mr. Remmer requested the records and they were delivered to Mr. Remmer. Then they found their way—I don't know how they got back to Mr. Weaver, I don't know whether the records ever got back to him after that or not—but I can't see

just on what you base an illegal acquisition of these records by the government.

Mr. Golden: Your Honor, the Court is laboring under a misapprehension of the facts. We are not talking about the records which were covered by Mr. Pechart's testimony at all. Those records are not part of this motion.

The Court: But this motion gets back to the same foundation.

Mr. Golden: No, your Honor, we are talking about records which were taken by the agents from other parties in San Francisco and some of which are now on deposit in the clerk's office.

The Court: What other parties?

Mr. Golden: We believe, although, of course, from the absence of bill of particulars we can't be certain, but want to develop it, we believe from the preceding witnesses, Mr. Maundrell, Mr. Kyne and others. Now we have no way of finding out without evidence.

The Court: Well, I am going to deny the motion. Call in the jury. The motion is denied.

ARGUMENT ON CROSS-EXAMINATION OF 15 PER CENT INTEREST

December 18, 1951

(In the absence of the jury.)

The Court: Now on the basis of the record and the last question or two of the record—

Mr. Gillen: May we have the last question read?

The Court: Yes, you may have it read.

(Last 2 questions read.)

"Q. Look at this agreement and tell me what was meant by working interest in the amount of 15 per cent?

"Q. Mr. Kyne, what happened to your 15 per cent share of any profits of the Menlo Club during the years 1944 and 1946 inclusive?"

Mr. Gillen: That is another matter than your Honor has ruled on.

The Court: I am making a statement. On the basis of your last question and on the question or two previous to it, in the face of the expressions of the Court, in effect asking counsel to desist from pursuing the line of examination, and to a similar question clothed in a little different language, to which objections have been repeatedly sustained, the Court hereby fines Mr. Gillen for contempt of this Court and fines you in the sum of two hundred dollars and remands you to the custody of the marshal until the fine is paid.

Mr. Gillen: Your Honor is absolutely unfair about this—

The Court: And counsel is remanded to the custody of the marshal until the fine is paid.

Mr. Gillen: Am I again to be shut out from explaining my position on the record? I asked your Honor to dismiss the jury and permit me to be heard why I was pursuing, but you arbitrarily refuse to do that?

The Court: Yes, sir.

Mr. Gillen: Now I want to be heard. I am an advocate of this court and I have a great responsibility on my hands.

The Court: You are committed to the custody of the marshal until this fine is paid.

Mr. Gillen: I will pay the fine. I will not be humiliated by being led out by the marshal. Here is the fine. I respectfully ask permission to explain to this Court what our position is, why we are attempting—

The Court (Interceding): Are you ready to proceed?

Mr. Gillen: I am ready to proceed with saying this—

The Court (Interceding): I have ruled that this contract takes care of this witness' interest in this contract and I am not going to permit you to explore that fact any further in your questions on cross-examination.

Mr. Gillen: Is this attitude of this Court fair, never to permit me to tell you why I am trying to read what happened to the profits along to the jury?

The Court: Do you want to keep on talking?

Mr. Gillen: I want to make a showing so I will have no further difficulties with your Honor's ruling.

The Court: What are you going to have to say?

Mr. Gillen: Here is what I want to have to say. Counsel has belabored throughout this examination, not only with Mr. Kyne, but also with Mr. Lando, who was a partner, asked repeatedly, "Did you ever put a cent of money into this business" and the answer was "No." Now, what I want to say is

this—that a working interest means simply this, the working interest that was the arrangement, not only what is appearing in writing, but in all other enterprises in which these men were interested, that this was the situation—that they were given a percentage of the partnership; that as the profits came in, instead of drawing down their profits, those profits were turned back into the business, so that they would reimburse the man who put up the initial money, until such time as the profits paid back. The profits, for example, that Mr. Kyne earned, were chargeable to him, he had to pay income tax on them, but instead of taking them out, he put them back in the business until such time as his equity levelled the amount of money that had been put in by Mr. Remmer, and that is what was meant by working interest. The way counsel is reading it, it invites the jury to draw the inference that Mr. Kyne, for example, and Mr. Lando were just phonies, that they never put a penny in, and although they were charged with the profits and although they were advanced money to pay their income taxes on those profits, that the fact of the matter was they never received anything. Now that is not the fact of the matter and the books of the Menlo Club will show that at a point Mr. Kyne's interest, for example, had reached some 30 per cent of equity of what he was entitled to on his 15 per cent. Now if I can make it clear, I can do it on the blackboard for the Court.

The Court: Well, that is hardly necessary.

Mr. Gillen: Does your Honor understand what I am getting at? I have tried to reach somehow and there is no reason that I can see, and I have not deliberately been abusive or discourteous—I have tried to reach the thing in a way to show what was meant by 15 per cent of the profits. It kept coming in, he did not draw it—the point I want to show is it went back into the business to build up his equity in the Menlo Club, until such time as he would have paid up what would have been 15 per cent of 75 thousand dollars.

The Court: Your questions were not directed to that direction.

Mr. Gillen: I did not have an opportunity—I may be stupid.

The Court: You are far from being stupid. You did not want to listen.

Mr. Gillen: I will follow any suggestions your Honor has to make to keep out of trouble, as to reach that point.

The Court: We will call in the jury.

Mr. Gillen: Your Honor has no suggestions? I would be very happy to hear from your Honor.

The Court: I do not think it is going to be a suggestion because I do not think the questions to which these objections were made and sustained had the purpose that you give to them here in this argument. You repeatedly asked this witness about his 15 per cent in this Menlo Club.

Mr. Gillen: I wanted to show what was the meaning of 15 per cent working interest.

The Court: No, you tried to make it appear in your question—I mean that is the way it would

appear—that he had 15 per cent interest in the Menlo Club from the inception of the operation.

Mr. Gillen: He did in the profits, your Honor, and it says so in Paragraph 8, but he did not get any actual physical—

The Court: Paragraph 8 is—

Mr. Gillen: Read Paragraph 8 and you will see he had an agreement, 15 per cent interest in the profits.

The Court: Wait a minute. (Reads Paragraph 8.)

Mr. Gillen: Now you see that was retroactive as of the very date the Menlo Club was purchased, May 1, 1945.

Mr. Campbell: That should be read with the succeeding two paragraphs.

The Court: (Reads further paragraphs.)

Mr. Gillen: You see what happened there—there are two different 15 per cent items; one is the actual physical property, namely, tables, chairs, equipment, accessories of the club, the other is 15 per cent interest in the profits. Now I want to find what each of those mean and how Mr. Kyne can obtain his 15 per cent interest in the physical properties from 15 per cent interest in the profits, which were retroactive on that agreement. That agreement was signed in 1946, but that 15 per cent was conveyed over to him retroactive as of May 1, 1945, the very day the Menlo Club was purchased and during the time he was in the army, he was enjoying the benefit of 15 per cent of the profits of the Menlo Club, and that was going to—

ward equity in the physical properties, and I think when your Honor sees my last point, your Honor should do something about your order for contempt. I have a regard for my reputation and do not like to be punished for disregard of the Court. I work very hard.

The Court: It does seem to me, Mr. Campbell, there are two different things here. Now the 15 per cent in the social bar and restaurant business: (Reads from exhibit.) However, in this paragraph 8, there is an interest in the profits, distinguished from an interest in the assets and the body of the business. Do you have a copy of this?

Mr. Campbell: I do not interpret the document meaning there is a 30 per cent interest.

The Court: No, there isn't, there is a 15 per cent interest.

Mr. Gillen: We never said there was a 30 per cent interest.

The Court: But in the 4th paragraph it recites the party of the first party to convey to the second party a 15 per cent interest in and to the social room and restaurant business.

Mr. Campbell: Then it goes on and provides, effective May 1, 1945, there is to be a 15 per cent working interest, as I understand it, in and to the profits. That money, however, is not to be paid to Mr. Kyne, but is to be applied by Mr. Remmer on the recoupment of the 175 thousand dollars; after it having been recouped, then the actual 15 per cent interest comes into being. That is my understanding. And while that 15 per cent is going

through the channel of Mr. Kyne, he is building up an equity in the actual physical property.

Mr. Gillen: No, he builds up an equity, but not that way.

Mr. Campbell: There is a question about that.

The Court: Isn't that 175 thousand to be accumulated from 15 per cent of the profits?

Mr. Gillen: May we put this on the blackboard?

The Court: I am going to set aside that order of contempt and ask the clerk to return to you the fine and I think this is a more involved contract than I thought it was when I first heard it.

Mr. Gillen: We are very concerned about it too, your Honor.

The Court: If the Court had the same understanding as he has now, I would not have made the order of contempt, although I think still that when the Court requests an attorney to desist from pursuing a certain line, whether objections were erroneously sustained or otherwise, you ought to desist.

Mr. Gillen: I felt I was hampered in my cross-examination and asked your Honor to hear me until I could make an explanation your Honor would understand.

The Court: I think there is enough here to permit this cross-examination.

Mr. Campbell: May I suggest this, in due respect. I think we should come to some understanding at least as to what is meant by this agreement—

The Court: I have this understanding, that the second party is not to own an interest until 175

thousand dollars is to be accumulated by the retention of 15 per cent of those profits by the first party; is that right, Mr. Gillen?

Mr. Gillen: That is not quite it, but your Honor is on the right track.

Mr. Campbell: May I make this suggestion from the government's viewpoint and possibly Mr. Gillen can agree. The evidence will show that several similar agreements were entered into with those who were active in the business, similar in every respect with the other parties. The agreement, as I understand it, has this ultimate end, that until Mr. Remmer is repaid 175 thousand dollars, there shall be credited, in this instance to Mr. Kyne, 15 per cent of the profit, but that shall not be received by him but shall be retained by Mr. Remmer, together with what he is retaining from the others under similar agreements, and what he is retaining from his own profits.

The Court: That is my understanding of it.

Mr. Campbell: Until he shall have reached 175 thousand dollars?

The Court: That is my understanding and I think he could pursue cross-examination to show it.

Mr. Gillen: I would ask Mr. Avakian to explain this matter very concisely to your Honor.

Mr. Campbell: I do not believe the witness can give a legal interpretation of this document and I think the objections which were heretofore made were properly made and properly ruled upon by the Court.

Mr. Thompson: Your Honor, it is for the Court

and jury to decide what the agreement means under directions by the Court. It is not for the witness to rise up in the chair and tell everybody what the agreement means.

The Court: Mr. Avakian?

Mr. Avakian: I think your Honor has grasped this matter pretty well. We would like to make completely clear what we understand the meaning of this agreement. If, for instance, your Honor, I may use hypothetical figures and reduce this twenty thousand dollars, to make the example more simple. Let us suppose A and B are going to buy a business that cost \$20,000. A has \$20,000 and B has no money, so B and A make an agreement that A will put \$20,000 up for buying the business, partner B will have a 50 per cent working interest in the profits and the understanding is that partner B will let his profits accumulate in the business to his credit, building up his equity from zero to 50 per cent. Partner A will draw more than his share of the profits, so that his equity, which is originally 100 per cent of the assets, will be reduced to 50 per cent, so that if the partnership is set up on that basis, then the initial entry in the investment account in the books will be partner A \$20,000, partner B zero. Let us assume the first year the partnership has no income from the \$20,000. Now because of the working interest in the profits arrangement, that \$20,000 will be credited in the investment account, \$10,000 to partner A and \$10,000 to partner B. Partner A's investment account will then be the original \$20,000 he put in,

plus \$10,000, or one-half of the profit credited, or \$30,000. Partner B's investment account, which was originally zero, will have \$10,000, because half of the profits have been credited, and therefore one would have an investment account showing \$30,000 to A and \$10,000 to B. At that point A makes a withdrawal of \$20,000, which reduces his investment from \$30,000 to \$10,000. Partner B withdraws nothing, so his investment account remains at \$10,000, so now we have B building up his equity by refraining from withdrawing his part of the profits until he has now a proportionate interest or equity in the physical assets themselves.

Now the question, your Honor, that the prosecution has been asking repeatedly of these witnesses—"Did you receive any of the profit?"—is misleading, because as your Honor knows, there are direct and indirect ways of receiving the same. If, for example, my employer deposits my salary in my bank account, in a sense I have not received my salary, but in another sense I have received it, because it has gone into my bank account, and so with these profits, your Honor, if we can show that their profits were credited to their investment accounts, so that their profits were able, in a way, to build up an investment for them, they have actually in indirect fashion, but nevertheless realistically, received the benefit of their share of profits. That is all we are trying to get at, your Honor, and for the prosecution to ask the question, "Did you receive any of this money?" and get a "No" answer and leave it there, is keeping the

jury in the dark. We want to show, although they did not get the money to put in their pockets, they did have their full benefit, because it gave them an ownership or equity interest in the assets of the business of the particular partnership.

Mr. Campbell: I want to be heard very briefly. Counsel's proposition is all right, except it does not take into consideration the agreement which they had in this case in regard to the Menlo Club, and that is this—there was no equity, as I take it, under this agreement which was built up in these people by reason of the working agreement, that is, no real equity, unless and until the 175 thousand dollars was fully repaid. For example, in the 4th paragraph on the second page, it is stated: "In the event of the death of the second party herein during the existence of this agreement"—this agreement exists until 175 thousand dollars is paid or the party withdraws: "* * * the interest of said second party and his estate shall cease and terminate * * *," etc. And it goes on to provide that his estate shall only have an interest—

The Court: That last statement seems to refute your theory. "There shall be paid by the first party or his successors in interest, to the legal representatives of the estate of the second party, the balance remaining on the account book maintained by the first party, in which is set forth amount of profits accruing to second party."

Mr. Campbell: If the second party, at the time of his death, shall have acquired said working interest.

The Court: How is he to acquire the working interest except from accumulation of 15 per cent profits?

Mr. Campbell: No, your Honor, he was only to acquire it when and if the first party shall have received the entire sum of 175 thousand dollars. Now that is my understanding of the agreement.

The Court: Then wouldn't that construction take any purpose out of the next to the last paragraph on page 1? What does that mean? It should be considered as having some purpose there. Your construction of that contract would eliminate entirely any consideration of that next to the last paragraph on page 1.

Mr. Avakian: That is Paragraph 8 we have been talking about.

The Court: Yes, just eliminate Paragraph 8 from consideration and you have the result that you are suggesting.

Mr. Campbell: Well, it is my belief that the construction and interpretation of the agreement is a legal matter for construction of the Court, not for interpretation of the witness. He has stated, if the Court please, that this is his sole and only agreement.

The Court: All right, but according to Paragraph 8, as of May 1st there was assigned to him by Mr. Remmer a 15 per cent working interest. I think counsel can pursue that on cross-examination.

Mr. Campbell: The prior question to which objection was sustained—

The Court: I am going to set aside those rulings

and allow him to pursue that 15 per cent mentioned in this Paragraph 8, and I will state if I had not had the wrong idea myself, I would not have taken the position I did, but still I have ordered the record show that you are purged from contempt.

Mr. Golden: Would your Honor indicate, for the record, the date set for that hearing of this morning this morning?

The Court: I will place it on the calendar.

Mr. Golden: What does that mean?

The Court: That means it will take its regular turn.

Mr. Golden: May the record show that we requested it be heard this week or next week?

The Court: It may so show, but it won't be.

Mr. Avakian: May I raise one more point before the jury comes back?

The Court: Yes.

Mr. Avakian: I think your Honor appreciates the implication of the questions that have been asked of some of these witnesses is that these partners were phonies—

The Court: That may be so, but I think there is something substantial in that Paragraph 8.

Mr. Avakian: Yes; my point is this, if the question of the good faith of a party is involved here, as it apparently is, then we should be permitted to question the witnesses as to their actual intent, because that throws light on whether—

The Court (Interceding): No.

Mr. Pike: Your Honor, may I make this observation—it is not my understanding that the Court

is called, at this time, to make a construction of the legal acts of the different parties under this agreement concerning the Menlo Club. The Court recognizes, as I view the rulings, that the respective parties in this particular case may proceed on their own theories as to meanings that they place upon that contract, considering that the rights of the parties are determined by the contract itself and so limited. Now what is respectfully suggested to the Court is as far as we can go, rather than to undertake, at this time, to define the rights and beliefs under the agreement itself. The cross-examination would be in accordance with the defendant's theory of this case and applications.

Mr. Avakian: Your Honor, it is a fundamental parol evidence rule that if an agreement is not clear on its face as to meaning or essential provisions which appear to call for some explanation, such as this, the working interest, the parties can explain what they mean by this provision, and that is a fundamental rule.

The Court: We have a decided difference of opinion as to the proper construction of this contract. I think counsel should be permitted to pursue on cross-examination this 15 per cent working interest in the profits.

(Five minutes' recess taken.)

[Title of District Court and Cause.]

ARGUMENT ON ADMISSION OF
117 SERIES

December 18, 1951

(In the absence of the jury.)

Mr. Golden: Now, if your Honor please, as we understand it, Mr. Campbell is attempting to introduce here various exhibits on the theory that since they came out of one of the boxes which we deposited with the clerk last week they must be the records of the particular enterprise in question. He is trying to lay connecting links, authenticating and proving and laying the foundation for these documents in that way.

Your Honor will recall that the testimony as to these records, so far as it has gotten into the record, is that the government had everything and gave back to Mr. Semenza the material which we deposited with the clerk. Now there is nothing here to show that the material which the government got originally is, for example, the regular books of account of the Day-Night Cigar Store. There has been no foundation laid for that. The government takes this position, they say: "We had some books which we think, or which somebody necessarily may have told us, are the books of account"—for example, Day-Night Cigar Store. "We gave those books and material to Mr. Semenza. Mr. Semenza gave them to you (that is, to counsel) and the Court ordered counsel to produce them." But the

basic foundation and identification of those books and records is not here. There is no way that we could question whether or not those are actually the books and records of, for example, the Day-Night Cigar Store. Do I make that clear, your Honor?

The Court: I think I understand your position.

Mr. Golden: So that is the reason, in addition to our legal objections and motions, that is the reason we object to the last few exhibits going in. Mr. Kyne does not positively identify them as the records of these places and Mr. Campbell says, "They must be authentic because I got them out of that box," but we don't know. All we can say is that they are the material which was given to Mr. Semenza, which he gave to us and which we deposited with the clerk, but accidentally, if it is accidental, other books may have gotten into that material before the government turned it back to Mr. Semenza, or other pieces of paper may have gotten in there other than some records of the taxpayer, and there has been some evidence here already that even the Bureau of Internal Revenue is not perfect in keeping of records and there may be some mistakes there. We ought to have this authenticated and ought to have the opportunity of cross-examination on it.

The Court: Let me remind you of this—you made an objection to the order, the order which brought this material into the court, on the ground that they were books and records of the defendant,

taken without compliance with the 4th Amendment, or in violation of the 4th Amendment.

Mr. Golden: Yes, that is what the government contends that they were, books and records of the defendant, but we have no opportunity to cross-examine to find out if that is so, and if your Honor will recall, we wanted to put on evidence to trace these books and other material from the time they originally got into the hands of the government, and we renew that offer. That may clear it up.

Mr. Campbell: I might state, your Honor, that in the first place these books and records, and the basis of the Court's order, was necessarily the subpoena which was served upon Mr. Semenza, in whose custody the books and records had been delivered by the government. Now the subpoena did not call Mr. Semenza in so many words to produce the records which were turned over to them. He was called upon to produce certain records in relation to specific businesses; in other words, regular business records of those businesses. Now for the first time, at the trial of this case, the defense took the position that they should not be compelled to comply with the subpoena by reason of the fact that all of these records referred to were the records of this defendant. Then after the Court's order that they produce those records, the records were produced and placed in the custody of the clerk, in compliance with the Court's order that certain specific records be produced.

Now these records have been in the possession of the defendant's agents and accountant, or the

defendant's attorney in fact and accountant, since 1949. Now counsel has delivered the records themselves, and after having had them in their possession for a period of three years, attempts to raise, by inference, that question that there may be other records contained in here that they know nothing about. I think no serious weight should be given to that, and as a matter of fact, counsel now refuses to agree that these very records were the ones that they deposited with the clerk, which is altogether incomprehensible under the circumstances, but be that as it may, these records were produced here as the records of those businesses and I think that is a sufficient foundation, when the Court has ordered that records, for example, of the Day-Night Cigar Store, which are specified in that order and subpoena and which are specified in the receipt given by the attorney-in-fact and the accountant or the taxpayer, as being the records of those businesses when he received them and returned to the Court under the subpoena calling for those official records, it certainly is sufficient foundation for their introduction in evidence.

Mr. Golden: May I just say this, your Honor, our objection goes to the matter of foundation. Now a subpoena is nothing more than a demand. Now—

The Court (Interceding): I wonder if perhaps—you used the term "foundation" which, of course, is proper, I understand that, but to get at the point that seems to be bothering us here, if we get down to this basis—the question in my mind, has there

been a showing made here some way, a legal showing, that these are a part of the records of the particular enterprise?

Mr. Golden: We do not know, your Honor.

The Court: Now if they were produced pursuant to an order to produce the books and records of all these enterprises of this defendant—

Mr. Golden: I do not want to interrupt—

The Court: Go ahead.

Mr. Golden: This is the situation, your Honor: The government subpoenas an agent or attorney-in-fact of the defendant to produce certain records pertaining to this entity and that establishment, and so on. Now that agent or attorney-in-fact produced, or turns over to us and we produce—that doesn't make any difference—produces certain books of say the 186 Club, Day-Night Cigar Store, and so on. There is no testimony in evidence that those are the books of that particular establishment. Before they may be used in evidence, somebody must get up on that witness stand and say this particular exhibit is one of the books of accounts of the Day-Night Cigar Store, for example. Nobody has done that. Surely Mr. Campbell cannot contend that in a criminal, or even in a civil, case that by subpoenaing something he has placed in the record evidence that the thing that is produced in response to that subpoena is what he claims it is, and that is particularly true in federal court, where a subpoena duces tecum is issued without an affidavit, not even an ex parte sworn statement here by anybody that the particular material listed in

the subpoena is what it purports to be. There is nothing here but a compulsory delivery by Court order or Court subpoena, which is the same thing.

The Court: The order contemplated delivery of books and records.

Mr. Golden: Surely.

The Court: The Court wouldn't assume that you had delivered something other than books and records.

Mr. Golden: Which we don't know. I hold in my hand prosecution's Exhibit 112A for identification. It shows for the place of the 110 Eddy Street and 50 Mason Street—

The Court: Wouldn't the defendant know, or the defendant's representatives know, these different institutions know that a certain book was not a record, and if that was so, wouldn't it have been eliminated from the material delivered?

Mr. Golden: No, your Honor, for four reasons: Number 1, these things were in the custody of the government for a long time; (2) the books were not personally kept by the defendant and he may well not know whether or not they are actually the records, he may never have seen them before, that is, seen them at the time they were being kept; (3) that would be compelling the defendant to testify against himself, and (4)—I have lost number 4, your Honor—just a moment—

The Court: I think there is enough here presently to show that they are part of the records of the enterprises. Now if they are not and that was

shown during the course of the trial, we might have a different situation.

Mr. Golden: Well, my fourth reason is this, your Honor; it is recalled to mind now. Your Honor said a moment ago, we would suppose, in response to the Court's order, you would only turn over the authentic records of these various places. Can we dare to take the risk of saying to ourselves, "We don't think this is an authentic record, we won't turn it in to the clerk pursuant to the Court order"?

The Court: I think so. I do not think that you would intentionally—suppose, for instance, one of our Federal Reporter books, 114 Fed. (2), happened to get mixed up with those records, would you produce that pursuant to that order?

Mr. Golden: No, but suppose Mr. Semenza tells us out of court that he does not think that this particular exhibit, just for example, is what the label on it indicates it is. Can we then go to the Court and say we do not think this is a record, we are not going to turn it in? Of course, we cannot. We have to turn it in and the government, to get it into evidence, has to show through a witness, whoever it may be, that this is a record of that business.

The Court: I think it is a fair assumption that when material is produced pursuant to an order of the Court to produce certain material, that the material produced is that material. I think we can stand on that.

Mr. Golden: It still has to be introduced on the

basis of testimony. Somebody has to swear that this is what it purports to be.

The Court: Well, there is some evidence to that effect. We are not entirely bereft of that. It is not clear, however.

Mr. Golden: Mr. Kyne says he does not know what business is there.

The Court: He does not go that far, that he does not know.

Mr. Golden: I wonder if we might have Mrs. McIntyre read the part where Mr. Campbell offered Exhibit—

The Court: He says it looked like Mr. Slater's writing; he didn't recognize the book.

Mr. Campbell: He also stated the books were maintained for that enterprise.

The Court: Well, the ruling will stand.

Mr. Avakian: Does your Honor want to take up the matter of the transcript on the offered series, now that the jury is out?

The Court: No, not now.

Mr. Avakian: We are ready to take it up any time your Honor desires.

The Court: Yes, but I have not had a chance to look at it. We will call in the jury.

Thursday, December 27, 1951—2:00 P.M.

(In the absence of the jury.)

Mr. Gillen: Because of his skill and knowledge, I would rather Mr. Avakian replied to the remarks of Mr. Campbell. (Last question read: "Well, did anybody ever reject this 1945 return or statement that you made concerning it?")

Mr. Campbell: Now my objection to that, of course, is as to being incompetent, irrelevant and immaterial. There is presently pending, which I did not want to state before the jury, in the Tax Court of the United States, claim by the government against the taxpayer with relation to all these claims, all these returns, a suit involving some 800 thousand dollars. If this question is to be raised as to whether or not the government or any of its agents told him that they rejected or accepted any filing of any of these things, I think the government would be entitled to show that the government has rejected these returns and has filed such a claim against the taxpayer, which is presently pending before the Tax Court; but I made my objection for the purpose of conserving the time spent here as much as we can, because of the belief that is a collateral issue. Of course, those returns are the basis of the indictment.

The Court: Wouldn't it be possible if these returns have been rejected—I don't know, of course, they have been—would it be possible they could be rejected without knowledge of this witness, who left the employment in 1948?

Mr. Campbell: And the acceptance or rejection is always subject to whatever later develops, so far as evidence is concerned, with regard to the government's position relating to the matter. As I say, there is pending before the Tax Court—and I do not think counsel would contradict—and presently at issue that suit involving some 800 thousand dollars with respect to the issues here. Now I do not believe, in fairness to the defense counsel, that they desire to inject the fact of that controversy before this jury, but if questions of this kind are asked, the government has a right to produce that evidence and show that, but I do believe it is collateral matter which should not be gone into.

Mr. Gillen: I think your Honor will recognize, anything said by any agent of the government to this witness—

Mr. Campbell: No agent can bind the government.

The Court: I sustain the objection as to what the agent stated.

Mr. Avakian: May I respond to Mr. Campbell's argument?

The Court: Yes, sir.

Mr. Avakian: I think it is important to bear in mind here we have two issues which this jury has to determine; one is the issue of correct tax liability, whether or not the income shown in these returns was correctly computed and reported. That is one issue. The second issue arises only in the event the returns were incorrect, and that issue is

whether incorrect returns, if they are incorrect, were filed with an intent to avoid taxes.

Now on that second issue we feel that the last two questions asked of this witness are highly material, they are highly significant, and for this reason, your Honor. It is quite possible that the 1945 Menlo Club return was incorrect; in fact, I would say, in view of the fact that the income was based on, for reasons the witness has explained, 1944 records of income, that it would be in the nature of a miracle if the exact figure of income shown on the 1944 return was the 1945 income. The 1945 income undoubtedly varied either upwards or downwards from the 1944 figure. It was explained why of necessity they had to use something, because the 1945 records were inadvertently destroyed, so they set forth in the best manner that they could in computing income of 1945, with a letter of explanation to the Internal Revenue. That letter of explanation has bearing on the question of their good faith and their intent. In other words, the witness has testified that thereafter, while he was still employed there, four or five revenue agents, whom he has named, were there investigating the income of the Menlo Club. Now I think all of us, who have any familiarity at all with various investigations, know that ordinarily a revenue agent, who spends any substantial amount of time on a case, will call to the attention of the taxpayer's representatives with whom he is dealing, anything which appears to him irregular. We grant, of course, they can not bind the government by that,

but in view of that practice of calling attention to irregularities as they appear, to mistakes, in view of that policy to call attention to any irregularity in connection with this matter, is a circumstance which the jury can properly consider in determining whether these people were acting in good faith and with an honest intent in preparing the return the way they did.

Now as a matter of law, they might have been wrong. That is a question which the jury will also have to determine, but if they were wrong, were they wrong honestly or justified in that? Now if they were so clearly wrong that had the revenue agent immediately spotted that and would call it to their attention, that would be some indication that perhaps they were not acting in good faith. On the other hand, if the revenue agents who spend all their time making audits, did not call their attention to this as irregular in connection with that matter, then that is a circumstance which the jury might properly consider in determining whether the action that was taken in preparing the return in this manner was one which could have been taken in good faith and on that question of good faith we feel that it is an important circumstance to show, and as Mr. Gillen has said, the case of the government here, so far as it is put in, is entirely one of circumstantial evidence, both on the matter of what the correct income was and the matter of good faith, so if the jury is going to have to determine those questions from circumstantial evidence, then shouldn't it have before it,

as one of the circumstances, the fact that four or five agents, in auditing those returns, did not say anything to the man who prepared these or assisted in its preparation, if prepared in an illegal fashion?

Now with respect to the 90-day letter decision that Mr. Campbell refers to in the amount of some 800 thousand dollars. That is a matter which is not in the record; Mr. Campbell has correctly stated there is such a case. In view of the fact he mentions--and I do not believe it will have materiality, because there is nothing in that 90-day letter which calls attention to any irregularity with respect to the manner of computing the 1945 income. There is a statement in it, without any explanation whatsoever, that described the receipts of the Menlo Club were in a figure larger than the amount shown on the returns, but there is no explanation of that whatsoever and there is no statement concerning the fact that the manner of computing was improper or evidenced bad faith. I mention that because it was brought up by counsel, but regardless of the competency of that matter, it is an important circumstance for the jury to determine whether there was entirely good faith in connection with this particular return, to know whether four or five agents, investigating the matter, did or did not call attention to anything irregular in connection with it. Now we submit when there is a matter of intent involved, the Court should not restrict us in showing the circumstances, and all the circumstances, that relate to the matter, because after all the guilt or innocence of this defendant,

so far as we can tell up to now in this case, is going to be determined entirely upon the basis of circumstantial evidence.

Mr. Campbell: I would like to make a very brief statement. From counsel's familiarity with cases of this kind, he must be aware of the regulation which prohibits agents from discussing with the taxpayer, during the course of investigations, what they find to be irregularities, but be that as it may, I agree that the intent of the taxpayer in filing his return is an element which must be considered and submitted to the jury, but the intent must be that of the taxpayer and must be that at the time of the return, that it was falsely filed. It is undoubtedly true there were a number of agents during the course of this investigation, because here is a very extensive groups of businesses, very extensive records which had to be examined, and therefore whether they said to this man, "Those returns aren't worth the paper they are written on, they are full of lies," or whether they said, "Those returns look all right on their face to me," isn't determinative of the issues here. They are collateral matters and I feel if this sort of thing is gone into, whether the revenue agents raised any questions as to the returns, then we will be entitled to show that the government has a suit pending of some 800 thousand dollars involving these years, and I object on the grounds that these questions are incompetent and immaterial to the issues before this Court.

Mr. Avakian: May I correct a general statement

I made with respect to the 90-day letter and explain it in more detail? I stated the 90-day letter shows a larger amount of gross receipts for the Menlo Club than the tax return did. Actually, your Honor, the difference between the 1945 Menlo Club tax return, that is in evidence here, and the gross receipts figure shown in the 90-day letter, which Mr. Campbell has mentioned, shows a figure of seven thousand dollars; the tax returns showing gross receipts of 558 thousand dollars and the 90-day letter showing 565 thousand dollars; in terms of percentage a negligible difference, and we say this 1945 tax return was rejected by the government because of only seven thousand dollars out of more than half a million, but incidentally, whether or not Mr. Campbell would be entitled to introduce this 90-day letter in evidence later, that is a question which your Honor can pass upon when the offer is made. Incidentally, we feel if the correctness and honesty and good faith of the 1945 return of the Menlo Club is being challenged by the government here—and I take it they are challenging it—then all the circumstances relating to that should be introduced in evidence here.

Now when we go into the matter of determining anything from circumstances, it is a familiar argument that I have heard the prosecution make in many of these cases—what have you to say in reply to such statement, by saying it would be contrary to regulations. For five years I represented taxpayers in home equity cases and with very, very few exceptions—I wouldn't know more than one case

out of ten—the agents have discussed with me, particularly things that they thought were wrong with returns and perhaps with the exception of one case out of ten it has been my practice and knowledge that agents have discussed any investigations with the taxpayers and representatives the things that they thought were wrong.

The Court: Do you contend there is no such regulation?

Mr. Avakian: I know of no such regulation.

Mr. Campbell: I am sure Mr. Avakian knows of no case where agents, in the course of investigation, have disclosed to the bookkeeper or taxpayer, or have discussed with the taxpayer, except in certain exceptional instances, their findings, and I am advised by the agents that by regulation they are not supposed to so disclose their evidence. It is true when the case comes into my office, I sit down with the taxpayer's representative and afford them an opportunity for conferences. I think they are afforded the same opportunity to come in and make an explanation to the Bureau while it is still in the investigative stage, they are offered that opportunity. However, the negative fact, which is what he is asking him—did they ever tell you anything was wrong?—I presume expecting a "no" answer—isn't proof of anything as of the time that the return was filed, which is where the intent counts, and it is the intent of the taxpayer, not the interpretation of the agent, that is material. It is the ultimate fact itself. What the agent may have said or even what he did say, unless it was said to the

taxpayer while the return was being prepared, certainly has no probative value.

The Court: The objection will be sustained. Bring in the jury.

ARGUMENT REGARDING ADMISSION OF EXHIBIT "Z"

December 28, 1951

(In the absence of the jury.)

Mr. Gillen: Now, may it please the Court, the defendant's Exhibit "Z" for identification is a document clarifying the situation which was requested by the government, according to my information, from Mr. Schriber more than a year ago, and it is my information that this document, either the original or one of the copies of this document, signed by both of the parties involved, Mr. Schriber and Mr. Remmer, has been in the hands of the government for more than a year. Whether it reached Mr. Campbell or not, I am not prepared to say; if not, it has been in the hands of the Internal Revenue Department.

Now the reason the document is of vital importance to the defense's case is that your Honor very readily recollects that Mr. Campbell, in questioning both Mr. Schriber and Mr. Kyne, and also Mr. Maundrell, invited the inference from those who listened, that there had been a cash payment of 25 thousand dollars and that the first check payment was an additional 25 thousand dollars rather than

a mere re-arranging of how the payments should be made. In other words, it becomes obvious that Mr. Maundrell, when he was setting up the books, decided he wanted a bank transaction, a check account there, and Mr. Schriber gave back the 25 thousand dollars and was given a check, which he put through. Now the inference has been invited—and the subject has been gone into by three different government witnesses inviting that inference—that there was an extra 25 thousand dollars paid by Mr. Remmer to Mr. Schriber. It has been explained to the contrary by three witnesses, and finally there was a statement made by both parties which was supplied to the government. That statement is identical, insofar as the transaction, of the status, is concerned, as was testified to here by Mr. Maundrell and is identical, so far as payments are concerned, with 125C, the government's exhibit, the ledger page on the Menlo Club.

Now I believe, may it please the Court, that I have laid a stronger foundation for admission, through Mr. Maundrell, of this exhibit than was laid by counsel in the matter of getting before the jury a bill of sale, or whatever the document might be called, for the purchase of a safe for 52 Mason Street by Mr. Kyne. Your Honor will recall that Mr. Kyne was on the witness stand for some four days. He was the government's witness. That the Herman Bros. bill of sale, or whatever it was, setting up the transaction, was not shown to Mr. Kyne, although Mr. Kyne was the man who purchased the safe and who signed as the purchaser

of the safe. At the time it was shown to Mr. Maundrell, Mr. Maundrell was asked to recall from memory the description of the safe and compare it with the description in the document. He was asked to testify concerning a transaction which took place in 1944 or a year before he became identified with the Remmer enterprises, and he was asked to identify Mr. Kyne's signature. On the basis of that testimony, it was determined by your Honor that a sufficient foundation had been laid for the admission of that document.

Now I would like to read—it is very brief—from the transcript exactly what the foundation was, and then I would like to point out to your Honor how much stronger my position is with Mr. Maundrell to have an identification and lay the foundation for the introduction of this document here. This will be found, may it please the Court, on page 1262 of the transcript and it begins at line 24. It is Mr. Campbell examining on direct examination Mr. Maundrell, the present witness—Mr. Campbell asked to have an exhibit marked for identification and then several discussions, and on the next page, page 1263, starting at line 20, Mr. Campbell:

"Q. Now I am going to show you plaintiff's Exhibit 139 for identification and ask you to examine it. Can you state whether or not that refers to the safe on the premises at 52 Mason Street?"

There was an objection by Mr. Avakian.

The Court: What was the objection?

Mr. Gillen (Reads): "Mr. Avakian: Objected to, no proper foundation laid as to the witness"

knowledge of the transaction—long before he came there. If your Honor will examine the document, I think you will see my point. You will observe the date and recall this witness' testimony as to the date of his employment."

The transaction of the safe was a year before Mr. Maundrell came to work.

"The Court: He may answer the question.

"A. It appears to be the same safe that we had there at that time.

"Q. Do you recognize the description set forth thereon? A. Yes.

"Q. And that is the safe to which you referred as having the 12 boxes?"

Objection by Mr. Gillen. My objection was:

"I think this is pretty much calling for his opinion and conclusion. I mean, there is no harm in the matter one way or another, but it is asking him to speculate on something that was purchased a year before he went to work there."

The question was read, and the Court says: "He may answer the question." I will read the question again:

"Q. And that is the safe to which you referred as having the 12 boxes? A. Yes, sir.

"Q. And do you recognize the signature hereon over the subheading 'Purchaser'?

"A. Yes, sir.

"Q. And whose signature is that?

"A. William Kyne.

"Mr. Campbell: This will be offered in evidence, No. 139."

Now Mr. Avakian made an objection and there was some discussion about Mr. Kyne not having been questioned and the Court suggested Mr. Kyne could be called by the defense and there was a question whether he be called back as the prosecution's witness or our witness.

Mr. Campbell: I think you should read line 14.

Mr. Gillen: I will read the whole page (reads):

"Mr. Avakian: Your Honor, we object to the introduction on the ground no proper foundation has been laid for the document. The witness simply states it seems to describe a safe similar to the one that they had when he later came there and the introduction of the document in this manner deprives us of the opportunity to cross-examine regarding it. Your Honor will recall Mr. Kyne, the witness for the prosecution, was on the stand for four days and if they had presented that when Mr. Kyne was here, we could have cross-examined Mr. Kyne at that time.

"The Court: I think Mr. Kyne was excused subject to call.

"Mr. Avakian: Yes, but if we had tried to cross-examine Mr. Kyne on this document, we would have been met with the objection it was not within the scope of his direct examination.

"The Court: I will permit you to cross-examine him.

"Mr. Avakian: And you will also instruct that he is brought back at the prosecution's expense?

"The Court: The objection is overruled. I will not make any commitments now on the expense.

"Mr. Avakian: Then we would have to bring him back at our expense to cross-examine him?

"The Court: Very well. Objection overruled. If you want to bring him back, you may.

"Mr. Avakian: We request that he be brought back at the government's expense.

"The Court: These discussions should be had outside the presence of the jury. They have no place in the record at this trial of the case."

I think that is about all on that subject, may it please the Court.

Now here we have a situation with regard to this Exhibit "Z" for identification where Mr. Maundrell was the only witness who was familiar with the transaction, just as Mr. Kyne was familiar with the safe transaction.

The Court: Do you want to use this document now?

Mr. Gillen: No, your Honor, I have it in mind, and I just want to say to your Honor that here we have a witness who handled—in fact, issued the checks—on the entire Schriber transaction, from the first check that was issued to Schriber. He set up the ledger account. He is familiar with the entire status of the thing, he is familiar with the signatures, and he is called upon to identify that statement set forth there as truly reflecting and augmenting his own ledger sheets and the cancelled checks and everything else.

The Court: Mr. Maundrell has already testified as to the facts as he recalled them.

Mr. Gillen: Yes, your Honor.

The Court: This statement was made how many years after the transaction with which it has to do?

Mr. Gillen: Well, what is the date on the statement?

The Court: March 7, 1949.

Mr. Gillen: Well, that was made, your Honor, at the government's request, according to my information. They wanted a statement from both parties as to what the status was on the payments and both parties made that and it coincided with the ledger sheets and certainly, your Honor, this document and our foundation that we have laid, and are prepared to lay—

The Court (Interceding): 139 was used, was it not, merely as memorandum or matter to refresh the witness' memory as to the description of the safe?

Mr. Gillen: No, it was with relation to the transaction and purchase of the goods.

Mr. Campbell: The invoice of the company who sold the goods.

The Court: Mr. Maundrell described the safe on the premises. He was shown this document and stated it was the same safe which he had been describing.

Mr. Campbell: As to that, your Honor, it is my understanding when we come to this particular document, which purports to be a summarization entered into between Mr. Schriber, who was a witness here and testified at length, both on direct and cross-examination, as to his recollection of the

transaction, and the witness Maundrell, who has testified as to what actually took place, here is an attempt at this stage to put in a summarization by Mr. Schriber, who is no longer on the stand, and by the defendant, who in effect, if that document were admitted, would be testifying without taking the stand. Now the best evidence, of course, is the witness who participated in the transaction, the checks themselves, and the books and records which were kept at that time. Here is a matter which was made up some four years after the transaction, not made by this witness, in which he is asked as to an accurate summarization but would signify nothing on that the defendant agreeing that this is an accurate summarization, and I can see no theory in law in which that would be admissible unless it was a document signed by the witness and being used for the purpose of impeaching testimony. He is here, is available as to cross-examination on this subject, as was Mr. Schriber, who were apparently two of the three parties to the transaction and that, I submit, is the best evidence. This particular document I have stated to counsel and I have stated to the Court, I have never seen before. I asked Mr. Weaver, in charge of the investigation, and he states he never saw it. However, assuming it was supplied to some government agent—I do not know—nevertheless there is no dignity by which it could become an exhibit in this case. It would come within the category, of course, of self-serving declaration and purports, according to counsel's statement—I have not read it carefully—to be

simply a summarization of this witness' testimony. I do not think it is admissible.

Mr. Gillen: In the first place, may it please the Court, in regard to Mr. Campbell's statement Mr. Remmer is in effect testifying to a self-serving declaration without taking the witness stand, he is doing that very thing in the tax return when he signs, he is testifying to the financial status without taking the witness stand and that becomes an important part here. Now it is in effect, this statement, a declaration against the defendant's interest because if it weren't as set forth in the books and if it weren't as set forth in this statement by both parties to the transaction, then Mr. Remmer could take credit for paying out an additional 25 thousand dollars he never paid out. That would be to his benefit in that instance, and in this instance it is a declaration against his interest. Now Mr. Campbell puts a witness on the witness stand and then by another witness he appears to be attempting to impeach and discredit that former witness' testimony—well, an illustration is the Schriber situation—he attempts to show by two other witnesses, against his own witness, that Schriber received 25 thousand dollars more than he did receive, and we think it is vital and we think it is certainly accumulative and additional to the testimony that has already gone in before the jury here. Now certainly it is a stronger situation for a man who handled the whole transaction, as did Mr. Maundrell, to look at a document that was signed by two parties to the transaction which he supervised and

handled and managed and planned and carried with them, to say, "Yes, this truly reflects everything I know about the transaction," as compared with Mr. Maundrell being called, after Mr. Kyne who bought the safe was on the stand for five days—the safe was never mentioned, being called upon to describe it. We can not, without your Honor's permission and making an exception, can not call back Mr. Kyne and examine. The objection would be proper if it wasn't within scope of Mr. Kyne's direct examination, because he had never been asked about it, but I imagine your Honor, that Herman Brothers and the various other people, have probably built a hundred safes of the same description as the safe which is described in that bill of sale at 52 Mason Street and yet they laid the weak foundation, "Does it look like the safe as described here at 52 Mason Street?" He didn't know anything about the purchase. He was asked preliminarily, "Is this signature of Willie Kyne?" and on the basis of that, "Yes, this looks like the safe and signature of Willie Kyne," that document goes before the jury. Why they didn't ask Mr. Kyne, I don't know; why they waited until some other witness was on the stand, I don't know, but here is the man who knows about the transaction, participated in setting up the books and he is asked as to what he knows, and we feel, your Honor, it should be permitted to go before the jury. It is practically an identical situation in which you permitted 139 to go before the jury.

The Court: The ruling will stand.

[Title of District Court and Cause.]

ARGUMENT RE: EXHIBITS 150,
150A AND "E"

Thursday, January 3, 1952—2:20 P.M.

(In the absence of the jury.)

Mr. Campbell: If the Court please, I wish to point out that this document which is being offered is offered under the certificate of the Deputy Commissioner in charge of the Chicago office of Bureau of Public Debts that a search of the Treasury Department's registrations and redemption records, which records involve bonds, disclosed no other bonds or redemptions by Elmer F. Remmer or Helen L. Remmer, either individually or as co-owners, than those shown in the information as set forth herein. The certificate of the Deputy Commissioner is followed by the certificate of Margaret B. Choppin, Records Administration Officer, Division of Office Services, office of Administrative Services, Treasury Department:

"I hereby certify that Chas. P. Peyton, whose signature appears above is the Deputy Commissioner in Charge of the Chicago Office Bureau of Public Dept and that all final records of the issue and redemption of United States Saving Bonds are maintained in that office."

The document has been issued under the official seal of the Treasury Department and is offered on the

basis of certified copy of a public record, under the applicable statutes herein referred to.

The Court: Do you consider Section 1733, Title 28 applies?

Mr. Campbell: No, not business records—this is certificate of public records.

The Court: Government records and papers?

Mr. Campbell: Yes.

Mr. Golden: Your Honor hasn't seen this. This is a group of pages tied together with an official ribbon and seal. The certificate is to the effect that the annexed pages were prepared at the direction of the person signing the certificate, who is a Deputy Commissioner in charge of the particular department, and he certifies, as I say, first that the pages were prepared at his direction, and second, that the registration and redemption records in Chicago, which is the main office, covering the period 1935 to 1948, don't disclose anything else pertaining to Elmer F. Remmer or Helen L. Remmer other than is in these pages.

Now this is not, your Honor, does not purport to be, any kind of an authenticated copy of any kind of an official record. This is something which was prepared by somebody—it doesn't say by whom—and this Mr. Payton, Deputy Commissioner, undoubtedly some clerk came in to him and said, "I prepared this at the request of Mr. Campbell" or some office staff, "Will you certify it." That is all he knows about it. These are not official records. This is a private record. As a matter of fact, while I may be mistaken, I am surprised at all the

government has access to this record. Certainly if I wanted to find out what records in that office showed as to bonds purchased by John Smith, I couldn't do it unless I had a letter from John Smith authorizing me to make inquiry. These are private. These are not public records, such as the clerk of this court has, open to the inspection of anybody, so they do not photostat those records. They simply make up some marked sheets and we have here an ex-parte statement, no more than an affidavit, that these marked sheets show what the records in Chicago show. Now there is no problem in bringing witnesses whom we might cross-examine as to the records. They have brought people from Chicago, New York and Honolulu. I might say this too, your Honor, while, of course, we have no knowledge as to the particular data in here, I am sure your Honor is aware, and we are, that government agencies, like any large office, any bank, do make mistakes. Now there have been cases certainly where a man has bought or redeemed a savings bond, an United States bond, and it does not show on their records. To cite a case, where the army pays a woman on the theory that she is a widow of a soldier killed in action and he turns up alive. Now we think we are entitled to cross-examine on voir dire the person who says that this is the actual record. We would like to have that person on the stand, would like to see the records, if physically possible, or pictures of them. After all, there are a certain number of bonds in here presumably purchased at certain times and

redeemed at certain times. There would be nothing to prevent the government from taking a photograph of the pages of official records on which these entries appear. For example, there may be some marks on these original entries which have not been copied. This is like I went into an office and made notes and saying, "I copied these down from official records" and you certified it. Certainly Mr. Peyton himself didn't do it, we know that. Will your Honor take a look at it?

The Court: I would like to see it.

Mr. Campbell: Of course, the only purpose of certification of an official record is to avoid bringing a large amount of records. There are perhaps millions and millions of bonds issued in this country that of course could not be produced here. For that reason that statute has been made. However, I will offer, in connection with that exhibit and ask to have marked for identification, a certification to which is attached photographic copies of all of the bonds referred to, which shows on their face the date and the amount of payment. I will ask to have the clerk mark this for identification. I hoped to avoid cluttering the record.

Mr. Golden: It isn't the circumstances of the bonds—

The Court: I understand your objection will go to this exhibit, the same objection would apply to this exhibit.

Mr. Golden: Yes and in addition to 150—

Mr. Campbell: I wish to submit the other proposed exhibit to the Court as well.

The Court: Well, let us look at the statute; Section 1733 of Title 28 reads: (Reads section)

Mr. Golden: Not records; they are bonds, your Honor.

Mr. Avakian: They are photostats of bonds purchased and redeemed.

The Court: Well, those would be records.

Mr. Golden: No, records is a writing which records for history some transaction or evidence. This is evidence of indebtedness.

The Court: Doesn't this record for history that these bonds were in evidence? The objection will be overruled. Exhibits 150 and 150A will be admitted in evidence.

Mr. Campbell: I think I should offer them in the presence of the jury.

The Court: Yes.

Mr. Golden: 150 is neither a record or a transcription of a record.

The Court: Now we have heard a lot about Judge Hand and I think he ruled some time ago that we could have a summary instead of bringing in voluminous books and records, that the court could receive in evidence summaries of official records.

Mr. Golden: Sure, if the witness takes the stand and can be cross-examined.

The Court: That is why we have Section 1733.

Mr. Golden: Yes, your Honor, and that says a record or transcript of record, but this is some notes taken by somebody. It doesn't purport to show the exact record.

The Court: I am going to admit them in evidence. Any other matters to be disposed of while the jury is absent?

Mr. Campbell: May I suggest a recess at this time?

The Court: Yes, we will be in recess for 15 minutes.

(Recess taken at 2:30 p.m.)

Defendant present with counsel.

Jury and alternate juror absent.

The Court: I want to consider a little further these exhibits, particularly 150. Now 150A is a group of records or copies of records of the Treasury Department and certified under the seal that the contents of this exhibit, photostatic copies of bonds, are true copies of records.

Mr. Golden: I do not want to interrupt your Honor.

The Court: Well, I would like to hear from you. Under Section 1733 these books or records or account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the transactions or occurrences as a memorandum of which same were copied or made. And then in (b), "Properly authenticated copies or transcriptions of any books, records, papers or documents of any department or agency of the United States should be admitted in evidence equally with the original." Now the documents comprising Exhibit 150A would fall within the provisions of subdivision (b) of Section 1933. Now

I am not so sure about the subject matter here, Exhibit 150.

Mr. Campbell: May I be heard on that at the proper time, your Honor?

The Court: Yes. Now 150 is composed of a number of sheets and I can't read that word—I suppose it is "information regarding United States savings bonds" and the certificate reads that the annexed reports, form CO 1596—and that seems to be the same form of these different documents—certifies that the annexed reports on form CO 1596, consisting of 10 pages, were prepared at the direction of this officer, contain information regarding certain United States savings bonds, derived from the Treasury Department records on file in the Chicago office. The Treasury seal. Now whether this exhibit, these documents, could be considered transcripts of records—

Mr. Campbell: That is the point we make. So far as these being private records is concerned, they are not. These are public records. They are bonds which have been issued. By law and regulations the Treasury Department, the proper function thereof, is required to keep records showing the outstanding bonds, the person to whom those bonds are outstanding, the purchase price and in the event of redemption by the United States, the amount of such redemption. The document itself, that is, certified copy itself, purports to be a transcript obtained from the books and records of account which were kept by that office in Chicago, which is certified to be the office where all such rec-

ords are kept for the Treasury Department relating to such bonds. As a matter of fact, a comparison of the two exhibits, 150 and 150A, discloses that the information in 150 is the same as that disclosed in 150A, with the exception of one bond, which 150 shows has not been **redeemed, or** was not redeemed at the time that the transcript was prepared and is therefore not set forth in 150A. 150A are photostatic copies, or photog~~r~~phic copies—I don't know the exact process—of the redeemed bonds, showing the original bonds. On the face of the bond, if redeemed, there is placed the stamp of the redeeming agency. In most instances, I believe, they are banks which redeem those bonds; showing the amount paid by the bank on account of the United States for the redemption of those bonds. Under the laws and regulations pertaining to bonds, various financial institutions are made authorized agencies of the United States, including banks who are members of the Federal Reserve, to redeem those bonds and they are, as a matter of fact, I understand, paid a small fee for that service performed in behalf of the Treasury, so that as to the Exhibit 150A, which are certain photostats of the original records themselves, they are the original record of invoice between the United States government and the purchaser of that bond—the only original record—in the book of account. As to 150 itself, it is a transcript of the records wherein pertinent information is gathered in a concise or precise form.

The Court: Now let me ask you this. Is your

understanding of the meaning of the word "transcript" as used in this section a summary? Is a transcript a summary of a record?

Mr. Campbell: Yes, your Honor. As this is used in the context of 1773(b) indicates that, when it says transcripts of any books, as compared to copies of books.

The Court: If that is so, then that seems to me to reach the objection counsel made as to a lack of opportunity to cross-examine the individual who prepared the summary or transcript. Right now the statute contemplates that a transcript of a record may be admitted in evidence. If a transcript is something which is prepared from a record, the statute does not contemplate that it would be admissible, only on condition that there is an opportunity to cross-examine the person who made the summary so transcribed. That is the thought that I had.

Mr. Golden: Well, your Honor, as to that point, if a transcript meant anything other than a true and exact copy—

The Court (Interceding): Tell me what you mean by transcript. What is your understanding? I don't take it it means a certified copy. I don't believe the word "transcript" means a certified copy of an instrument or a document.

Mr. Golden: It means, in my understanding, an accurate excerpt, complete in itself as far as it goes, that is, including whatever dates it includes or whatever material it includes. If it is in any sense a summary or involves to any degree what-

soever the discretion of the person preparing it, who is not under oath, then we have extra-judicial discretion.

The Court: Let us see what this certificate is. Now he certifies that the annexed reports were prepared at his direction and contain information regarding certain United States savings bonds, derived from the Treasury Department records on file. Now a transcript would be nothing more or less than information from records, would it not?

Mr. Golden: It would be more than that. It would be all the information from the records. For example, your Honor, I am sure your Honor during the war purchased bonds of this nature—you will recall that the person who makes the purchase, the person who actually steps up to the window and buys the bond, can buy it in some one else's name or he can put some one else down as purchaser, or I can take my associate's money and buy a bond in his name. That would all show on the entire record.

The Court: The thought I have is that that objection perhaps goes more to the weight than to the admissibility of the offered exhibit and if such a condition exists, why the defendant could show it.

Mr. Golden: We could show it if we had the man here, yes, but how could we show it under these circumstances? Your Honor, I had a divorce case a few months ago, in which one of the bonds, or some bonds were in issue and I wrote to this office in Chicago and the reply came back that if the person who, according to the records was the

owner of the bonds, authorized it, they would let me have the information. Now these are not—Mr. Campbell says they are public records—they are not. It is true a bond is indebtedness of the United States, but it is also an asset of the owner, but no one can get that information without the owner's authority. It is a government record, but it is not a public record. Any one can walk into the clerk's office and ask to see the record of any case filed in this court.

The Court: But the government might be in a different position than a third party individual.

Mr. Golden: They might be, but I do not know any authority for that right.

The Court: It would seem in cases where the government is a party, the government could use its own records in support of its action.

Mr. Golden: For example, in order for some Congressional Committee or the Federal Trade Commission or some State Department of the government to obtain income tax returns of a certain individual, they have to get the permission of the President.

Mr. Campbell: I beg your pardon, that is not quite correct.

The Court: I just wanted to make sure that I had the right view of the application given Section 1733 to the exhibits, and I think I have.

Mr. Golden: Of course we do not think those exhibits are records or transcriptions of records.

The Court: I feel certain as to 150A but I have some doubt as to 150, but I think—

Mr. Golden: Mr. Peyton says there the attached pages contain all the pertinent information. Who is Mr. Peyton? Maybe he doesn't know what pertinent means, for all we know. There may be some information which he thinks is not pertinent and which we think is pertinent.

The Court: I fail to see that word "pertinent" here.

Mr. Golden: I think it is there.

The Court: He certifies that the annexed reports were prepared at his direction and contain certain information. He further certifies: (Reads from exhibit.)

Mr. Golden: Of course, I did not have it in front of me.

The Court: There is no conclusion there so I feel that these statutes have a purpose and the purpose is to make it more convenient to introduce documents of this nature. So I am going to admit the exhibits when the jury comes in.

Mr. Golden: As long as the jury is out, there is an entirely different matter that would take just a moment.

The Court: Yes, certainly.

Mr. Golden: It concerns defendant's Exhibit "E," which is the amended income tax return for Helen Remmer, it is Exhibit "E" for identification.

Now if I can refresh your Honor's recollection on that, because this happened several weeks ago. Mr. Mooney was on the stand and he testified that he had prepared amended returns for 1944 for

Helen L. Remmer and Elmer F. Remmer, at which point we introduced for identification the Exhibit "E," and he stated that at the time he was a witness before the grand jury Mr. Campbell had the amended 1944 return of Elmer F. Remmer and Mr. Campbell said at that time he had some recollection of that, he would check on it further. Mr. Mooney testified that those two 1944 amended returns had been filed and subsequently he said he was almost positive they had been filed and he was positive that the additional tax called for by those returns had been paid into the Internal Revenue coffers. Now we had no direct answer from Mr. Campbell as to whether he had found such document, but he did subsequently produce Mr. Forrester, the local deputy here, who testified that he had not found any record of the filing of those amended returns. Now on the basis of Mr. Mooney's testimony we offer in evidence defendant's Exhibit "E," which we overlooked at the time offering in evidence and found on reading the transcript we had not, and we also would like to inquire whether Mr. Campbell has located, among his papers, the corresponding amended return for Elmer Remmer.

Mr. Campbell: I will state for the Court I have examined the grand jury minutes and have also refreshed my recollection, and I find that my recollection coincides with that of Mr. Pike and Mr. Thompson, who were also present before the grand jury. Mr. Mooney used before the grand jury the same pencilled written document which he produced here and which has never been in the posses-

sion of the government, except during the course of his questioning before the grand jury, when he was questioned about that document. So far as any record, we have found no such document was ever filed with the government of the United States.

Mr. Golden: Well, the testimony of Mr. Mooney, your Honor, appears in several places. First on page 440 of the transcript, the last line of page 439:

“Q. Now, Mr. Mooney, I hold in my hand defendant's Exhibit E, which I will identify for you as amended return for 1944 for Helen Remmer, made out in pencil, in your handwriting, which you said was a counterpart of identical one for Elmer Remmer. * * *”

And then a little farther down, line 16, the question is asked again:

“Q. These were filed and collected?

“A. So far as I know. They might have got lost. The money was paid.

“Q. But the money was paid?

“A. Yes, I think I turned the money in on two slips, two credit slips, and the returns were filed two weeks afterwards or maybe a month.”

Then, if your Honor will recall, at the time that occurred he testified Mr. Remmer bought the stock in Mr. Mooney's mining company, thereby reducing the amount of the check that he had ready to pay the income tax and stating that he would forward that money in a few days, before the tax was

due. You recall Mr. Mooney testified that when he looked it up in the office, he found Mr. Remmer had a credit, so it wasn't necessary to collect that further money from Mr. Remmer, which is certainly sufficient evidence to go to the jury—in fact, it is undisputed, uncontradicted evidence. And also Mr. Forrester is the one who testified, although his records did not show that credit, it was apparent from the records that nothing was done about trying to collect that additional tax from Mr. Remmer, so the evidence is really undisputed there was that credit there, which could only arise if these amended returns had been filed and the money paid, and we think that is ample evidence to place in evidence before the jury Exhibit E.

The Court: Mr. Mooney testified he could not recall whether Mr. Remmer's amended return was filed. I have it under my note on Exhibit E. He was talking about contributions Mr. Remmer had made, something about a 15 per cent contribution, that was in 1944 amended returns for Helen Remmer, Exhibit E.

Mr. Golden: May I read this one sentence here, your Honor. This is Mr. Gillen questioning Mr. Mooney and Mr. Mooney's answer:

"Q. It is true, is it not, that you filed both of these amended returns and that you collected what was due, the additional money that was due, and turned it in on those amended returns and that that created the credit?"

"A. Yes, there is a book charge, interest, probably two years in there, 1944."

Of course, we haven't Elmer Remmer's amended return and we are not offering that, but there is in evidence for identification Helen Remmer's amended return and the only purpose of these proceedings is to offer in evidence the exhibit which is already in for identification and which we overlooked offering in evidence on December 6th.

Mr. Campbell: To which we object. That does not purport on its face to be a return ever filed. It was never received by the Collector's office. It purports to be some pencilled writing—

Mr. Golden: Oh yes, this purports to be a copy, not the one that was filed.

Mr. Campbell: Pardon me. The Collector's records do not indicate any amended return for either Helen Remmer or Elmer Remmer was filed for that year. As I said, further at counsel's request, Mr. Mooney made some statement about having been examined on that purported amended return before the grand jury, but examination of the grand jury minutes refreshes my recollection, which was confirmed by Mr. Pike and Mr. Thompson, who were present before the grand jury, that Mr. Mooney produced this document at that time.

The Court: So that he did say the records of the department disclosed no such filing. Doesn't that present a question for the jury—have this exhibit admitted in evidence and it is a question for the jury to determine whether or not that return was ever filed.

Mr. Campbell: That is true if Mr. Mooney's

testimony goes to the point that he claims to have filed it.

The Court: Well, what is his testimony?

Mr. Golden: Start at the bottom of page 439:

"Q. Now, Mr. Mooney, I hold in my hand defendant's Exhibit E, which I will identify for you as amended return for 1944 for Helen Remmer, made out in pencil, in your handwriting, which you said was a counterpart of identical one for Elmer Remmer. It is true, is it not, that you filed both of these amended returns and that you collected what was due, the additional money that was due, and turned it in on those amended returns and that that created the credit?

"A. Yes, there is a book charge, interest, probably two years in there, 1944."

The Court: I think that is sufficient to admit this exhibit.

Mr. Campbell: Yes, if you refer to the answer. The question contains a number of elements, including the filing and whether or not there was a credit. His answer is: "Yes, there is a book charge, interest, probably two years in there, 1944." Certainly that is not a statement that such a return was filed.

The Court: I think it is.

Mr. Campbell: He is answering, as I take it, one element. Pardon me just a moment—I do not find immediately what I was looking for. May I suggest that your Honor defer the ruling on this until we have a further opportunity to examine the record?

The Court: Very well, but I am inclined to admit it. I take Mr. Mooney's testimony to be that this was filed, and if that is his testimony I think it should be admitted and then the question as to whether or not it was filed is a question for the jury.

Mr. Campbell: So your Honor will defer the ruling?

The Court: Yes, I will. So I guess we are ready for the jury now.

[Title of District Court and Cause.]

ARGUMENT RE: EXHIBIT 153

Wednesday—January 9, 1952, 10:30 A.M.

(In the absence of the jury.)

Mr. Campbell: Now, if the Court please, your Honor will recall the state of the record, wherein Mr. Kyne was asked as to the ownership of 110 Eddy.

Mr. Gillen: Is Mr. Kyne here? I think it might be well, your Honor, if Mr. Kyne is here.

Mr. Campbell: I do not think his presence in the court room is necessary during the argument.

The Court: I do not think so either.

Mr. Gillen: I only had in mind in other instances the witness involved was present. I thought you might want to do that again.

The Court: Well, we will see if it is necessary to have him in, he may come in; while it is necessary that he remain here.

Mr. Campbell: He was not excused yesterday. The matter was deferred until this morning.

Mr. Gillen: I believe he intends to be here.

Mr. Campbell: Very well. Your Honor will recall the record as it existed when Mr. Kyne was on the stand. Mr. Kyne was asked as to the ownership of 110 Eddy Street in November of 1945. He stated that he had no personal recollection. First he said he referred to the books and records and then asked as to his own recollection, he said he had none. He was then shown the exhibit, purported to be affidavit executed by him in November of 1945. He was shown the document and asked if it refreshed his recollection as to the situation as it existed then. He stated that that did not refresh his recollection, but that the affidavit, the document which he had signed—he identified his signature, the fact he had sworn to it—spoke the truth of the facts as he knew them at that time, although he had no present recollection. The document was offered in evidence as past recollection recorded.

In that connection I wish first to call your attention to Warden on Criminal Evidence, reading from page 1384 of Vol. II, which is paragraph numbered 803, 11th Edition, 1935 Edition, the heading of Memorandum: (Reads) Now the witness here has testified it did not refresh his recollection, and the text writer, Warden, goes on as follows: "However, in some cases * * *" citing State vs. Easter, 185 Iora, 7 N. W. 748.

Now in Volume III of Warden's Criminal Evi-

dence, also the 11th Edition, paragraph 1276, appearing at page 2143, Warden writes as follows: (Reads) Which is the situation in the record here.

The Court: He did not testify here to the effect that he recalls by means of the memorandums those facts stated, but he did state the affidavit was true.

Mr. Campbell: Yes, he said the affidavit was true and truthfully stated the facts as he knew them at that time.

The Court: Is that in the record?

Mr. Campbell: That is my understanding of the record. Now may I read further from this text?

The Court: Yes.

Mr. Campbell (Continuing): "He may then testify—" It goes on to point out that the rulings are not harmonious as to the admissibility of the record, citing *Bates v. Preble*, 151 U.S., 149.

The Shoborg case, 264 Federal Reporter at page 1—

The Court: What circuit?

Mr. Campbell: From the 6th Circuit. Reading from page 9: "The court received in evidence * * *"

The Court: Those were reports that were required to be made, weren't they, in the course of their employment?

Mr. Campbell: The particular reports in that case, as I recall, were made by the investors. My recollection is that they were listening in on telephone conversations. This is decision prior to the time of the restriction now placed by the Interstate

Communications Act. They were making notes as to the conversations and then summaries of those notes at the end of the day.

Mr. Gillen: Before we lose the thought of those citations, I would like to ask counsel, through the Court, if it isn't a fact that Shoborg disagrees with Bates vs. Preble and says it is the contrary?

Mr. Campbell: Yes, I so read from the Shoborg case.

Now I wish to also refer to the case of Putman vs. Moore, reported in 119 Fed. (2d), at page 246, a 5th Circuit case, in which the decision is written by Judge Foster of that circuit. Reading from page 248: (Reads) "The general rule * * *" Now the transaction involved in that case, concerning which the testimony was sought, was, as I recall, not one required to be kept.

The Court: The effect of that case is that the witness might testify from memorandum.

Mr. Campbell: Even though he has no recollection.

The Court: What does that mean, that he might read it?

Mr. Campbell: He might read it into evidence or it might be read into evidence or received in evidence.

Now some question was also raised on the matter of best evidence and the books. Of course, the best evidence rule is applicable when the contents of a particular document are attempted to be established by evidence of the contents of that particular document when that document is available.

That is not our situation here. Here we are attempting to establish the ultimate fact, the ownership in that particular business.

The Court: I want to get that.

Mr. Campbell: Now in that connection I wish to refer your Honor to the case of *in re Ko-Ed Tavern, Inc.*, which is reported at 129 Fed. (2d), at page 806, an opinion of the Circuit Court of Appeals for the Third Circuit, where one of the issues was as to the ownership of a bankrupt corporation. In that connection the Court, on page 810, states as follows: (Reads) And incidentally Lyon's stock ownership was not denied at any time.

In this connection also I wish to read from a decision by Judge Jerome Frank of the Second Circuit, *Hersey v. Swift & Company*, 146 Fed. (2d), at page 444, reading from page 445: (Reads) We are not called upon to decide this question.

Now we submit, if the Court please, that in the present state of the record, wherein the witness has testified that, while he has no present recollection and while his recollection is not refreshed by his examination of the affidavit, but that affidavit which was given in 1945 spoke the truth as he then knew the truth, that such affidavit is admissible in evidence here as a past recollection record and that the matter of the best evidence here has no application to the instant situation, and we offer the document in evidence.

The Court: However, from your argument I take it that, assuming that your argument presents

the correct view of law, there is a question here as to whether or not the witness may testify from the affidavit or whether the affidavit itself may be admitted in evidence. Now that is a pretty nice distinction, but there is that question.

Mr. Campbell: Well, I take it the better rule is that announced by Warden and which has been followed in federal jurisdictions.

The Court: If we should go on the other theory, that the witness may testify from memorandum, what would that mean, that he could be asked, his attention called to that portion of his memorandum, this affidavit, and be asked to read what that states?

Mr. Campbell: It would be a question, as I take it, the distinction would be whether he would read the affidavit, in effect, to the court and jury, or whether the affidavit itself would be admitted before the Court and jury.

The Court: However, there might be other matters in that affidavit. I haven't it before me or I did not look at it. There may be other matters in that affidavit which would have no bearing on this situation.

Mr. Campbell: As to the ownership.

The Court: If I went along with you on this proposition, I would limit it merely to reading that portion of the affidavit which concerns this one point.

Mr. Campbell: Yes. I think the entire affidavit, if your Honor will examine it, is directed to that

one point as to the ownerships and the nature of the ownerships in the business.

The Court: However, have counsel any different ideas?

Mr. Avakian: So I may not be under any misapprehension, it is my understanding, both from what was said this morning and what Mr. Campbell said yesterday, that the affidavit which he is offering is offered not by the way of impeachment by way of testimony of Mr. Kyne, not by way of contradiction of anything already covered, but apparently as a memorandum made in the past, concerning some facts beyond what is already in this record. If I am incorrect on that, counsel should correct me.

The Court: Let us see if we can all agree on it. I understand it relates to a matter of which the witness has no present recollection. He has no present recollection who the owners of 110 Eddy were at this particular time involved.

Mr. Avakian: No, I do not think that is correct. There are two elements involved in this ownership. As to one, he has testified, as to the other, he said the books are the best evidence. Now I presume the questions put to him regarding this affidavit, as to questions which he said he did not now recall, those questions and his answers went to that element to which he said the books were the best evidence as to value of interest which each partner has built up in the business, whereas, insofar as the other element of percentage and share is concerned, we have already had testimony.

The Court: I would like to get the question from the record.

Mr. Avakian: First of all, I would like to read the testimony on that latter, given by Mr. Kyne on December 17th.

Mr. Campbell: I think we are concerned with matter which occurred here yesterday.

Mr. Avakian: This is part of Mr. Kyne's testimony.

The Court: You may read it.

Mr. Avakian: On December 17th, commencing on page 904 of the transcript, Mr. Campbell asked these questions of Mr. Kyne and Mr. Kyne gave the answers as I will read them. The question related to Mr. Pratt in connection with 110 Eddy:

“Q. Now how long did Mr. Pratt remain interested in the business?

“A. I don't remember. The books should show.” Mr. Campbell then obtained the books and there was an identification of those and then he said:

“Q. Now in whose name were the liquor licenses at 110 Eddy Street?

“A. I think they were in my name.

“Q. Over what period of time?

“A. Oh, about a year, I guess.

“Q. What year was that?

“A. I don't know whether it was '42 or '43.

“Q. And in whose name were they after that?

“A. Remmer, Kyne, Cavani and Turner.

“Q. How long did they continue in those names?

“A. Until the place folded.

“Q. When was that?

“A. I believe it was '47.

“Q. What was Turner's first name?

“A. Clarence I think.

“Q. And it is Frank Cavani?

“A. Frank Cavani, yes sir.

“Q. Now during the years 1944, 1945, and 1946 did Cavani and Turner continue throughout that period to be active in the conduct of the business?

“A. Yes sir.

“Q. What were their duties in respect to the business?

“A. I believe that Cavani was there in the day time and Turner used to be there at night time.

“Q. What duties did they perform there?

“A. Manager.

“Q. And what share of the business, if you know, did Cavani have?”

And I call your Honor's attention to the fact he was questioned there as to the share of the business:

“Q. What share of the business, if you know, did Cavani have?

“A. One-fourth.

“Q. And what share of the business did Turner have?

“A. One-fourth.”

So that there he is being questioned by Mr. Campbell as to 1944, 1945, and 1946 and when he is questioned as to the share that the partners had there as in 1944, 1945, and 1946, he states directly, in response to a question, if you know, he states di-

rectly that Cavani had one-fourth share and Turner had one-fourth share. Now that is a part of Mr. Kyne's testimony in this case and he had no difficulty in stating from present recollection, from personal knowledge, what the shares of the business were.

Now we come to the questions that Mr. Campbell asked yesterday on further examination. I am reading now, being page 1836 of the transcript, Mr. Campbell's questions and Mr. Kyne's answers:

“Q. Mr. Kyne, with relation to the 110 Eddy Street as of the month of November, 1945, will you state what the interests were in that concern?

“A. Well, the money put into the place was supposed to be met with and then we would be partners.”

That is a significant answer to the whole matter here:

“A. Well, the money put into the place was supposed to be met with and then we would be partners.

“Q. Now as of that date, as of the month of November, 1945, who owned the business?”

And after an objection and ruling, the answer:

“A. The books would show that.

“Q. Would you answer my question? I am asking you?

“A. I say the books would show that.

“Q. What was your interest at that time?

“A. The books would show that.

“Q. What is your recollection of your interest?

"A. I forget.

"Q. You do not recall what your interest was then?

"A. No, I don't.

"Q. Did you know at that time what it was?

"A. No, I don't.

"Q. Did you at that time in November of 1945?

"Mr. Gillen: What was the question?"

And Mr. Campbell said: "Did he know in November of 1945 what his interest was, and after an objection Mr. Campbell withdrew that question and said:

"Q. Does this Exhibit 153 for identification, which you identified as being your signature, refresh your recollection in that regard?"

And after discussion between Court and counsel he answered:

"A. It does not refresh my memory.

"Q. Mr. Kyne, will you examine this document. Will you read it through—

"A. I have read it through.

"Q. —and state whether or not it sets forth the truth as you understood it at the time you made that affidavit?

"A. Yes."

And then after further discussion between Court and counsel, the question was:

"Q. Now will you state at this time your understanding as to the ownership of the business known as 110 Eddy in 1945?"

There was an objection by Mr. Gillen and Mr. Campbell said:

"I will withdraw the last question * * *"

So that question was never answered, your Honor, and we never did get the answer as to what his understanding is at this time as to ownership of the business.

"Mr. Campbell: I will withdraw the last question and offer the document in evidence on the basis of the witness' testimony that he does not recollect at this time but that this document states the truth as he knew it at that time, and submit the document to the Court."

Now an examination of the document shows, your Honor, that it contains not one single statement as to the amount in dollars of the interest that had been built up in this business. When Mr. Kyne was questioned as to percentage share, as I read to your Honor, he answered directly what the percentage share was, but then yesterday, after he had stated that these shares were to be paid for by money in the place being met with, then immediately after that—in other words, after the witness was talking about amounts they were to be paid, immediately after that Mr. Campbell started questioning him as to what his interest was in November of 1945.

The Court: What is the question before the Court, the question which it is objected to this exhibit will answer? Is it what is the percentage or what his share is or who the owners are?

Mr. Avakian: My interpretation of it is—has the investment been paid back so that the partners, who are going to buy their shares, have become owners, or have they not yet become owners or partners in the business.

The Court: Let us refer again to the questions yesterday.

Mr. Avakian: Page 1836. You recall this further examination. **Mr. Kyne** has already been questioned on the shares of the business. This is something additional that comes up after he testified on the shares.

The Court: The question now upon which all this discussion arose yesterday was this: "Now as of that date, November, 1945, who owned the business?" That is the question before the Court.

Mr. Avakian: That's right. Now, your Honor, bearing in mind all that has gone in in this case about arrangement of these partnerships, how the partners were brought into the business, and your Honor will recall that that question was withdrawn—

The Court: Not this question.

Mr. Avakian: But the question just before the offer in evidence.

The Court: This question is still before the Court: "Now as of that date, as of the month of November, 1945, who owned that business."

Mr. Campbell: That was my inquiry that brought this up.

The Court: The court ruled and went on to say the books would show.

Mr. Avakian: That is where it is referring to the amounts credited to each partner and the books will show whether each partner has built up his equity to the point where he becomes an owner in the assets. There is nothing in this affidavit which states what the amount of interest in it is. The only thing in his affidavit is covered by his direct testimony. That is all he testified to, are the things that are in the affidavit.

Now my point is this, your Honor. Mr. Kyne has already testified as to shares that each of the partners had for the years 1944, 1945 and 1946. If this affidavit is offered to discredit that testimony, to impeach it, the testimony he gave on December 17th, which was direct testimony on the shares of the business and who the partners were, then if it is offered for that purpose, we have a different question as to whether the proper foundation has been laid for impeachment. If it is offered for the purpose of showing whether the partners had by November of 1945 paid for their interests, bearing in mind their interest in the business as distinguished from interest in the profits was to be paid for out of the profits that would come to them in the books, if it is offered for the purpose of showing whether by November, 1945, that interest had been paid for, then this affidavit does not throw any light on that and the books are the best evidence, because they show what has been accumulated in November, 1945.

The Court: Let me say this now—I think I see your point, but yesterday he was asked, "Now as

of that date, November, 1945, who owned the business," and he told us he didn't remember, had no recollection.

Mr. Avakian: That is the context, your Honor, of his present answer, that the ownership was to be acquired when the investment had been paid.

The Court: Well, he didn't recollect who the owners were. He said that yesterday.

Mr. Gillen: Your Honor will have to read the preceding question and answer.

Mr. Avakian: And also the preceding testimony as of December 17th as to who owned the shares in the business.

The Court: All right. "Q. Mr. Kyne, with relation to the 110 Eddy Street, as of the month of November, 1945, will you state what the interests were in that concern? A. Well, the money put into the place was supposed to be met with and then we would be partners. Q. Now as of that date, as of the month of November, 1945, who owned the business?"

Mr. Avakian: And he said the books would show that. It is obvious then he is talking about these amounts that had been built up, which would pay for the original investment. If by interest Mr. Campbell meant percentage rather than dollar amount, that has already been answered.

The Court: You want to know as of a certain date, in November, 1945, who owned the business.

Mr. Avakian: Right, and that involves the question of whether the credits had been built up enough to pay for it, and the books are the best

evidence of that, as the witness said. Now if there is any uncertainty about what this means, a question of Mr. Kyne on voir dire would clarify as to what he meant.

Mr. Campbell: I submit the question was a very simple one asked of Mr. Kyne. He states he has no present recollection, that that document speaks the truth, and certainly that document answers that question as to who owned the business.

Mr. Avakian: Just a moment. I do not know whether counsel means when he says what the interests were, whether he means percentage or dollar amount. I interpret this as to dollar amount and I think that is clear because as to percentage he has already questioned him and it has been answered and I submit the further questioning refers to the other aspect, namely, dollar amount.

The Court: Now I am speaking about this question and answer. He merely stated he can't recall, he has no recollection of the matter involved in this question. Now, "As of the month of November, 1945, who owned the business?" He answered that, he said he can't recall. That answer itself might not be sufficient to warrant a showing that this witness is hostile.

Mr. Avakian: I do not think they are attempting to show that. I asked if they are trying to impeach and they have not answered that.

The Court: If the showing was or the contention was here, and the Court went along with it, that this was a hostile witness, then this affidavit, of course, could be included.

Mr. Avakian: But we submit, your Honor, the question—are we talking about dollars and cents interest or talking about shares?

The Court: I don't believe counsel is confined to be restricted in his examination of a witness by prior questions he might have asked. Suppose we would eliminate from consideration these other matters that occurred when Mr. Kyne was on the stand before and just take what occurred yesterday. We have a situation there where he was asked as of some time in November, 1945, who owned the business and he said he had no recollection, the books were the best evidence. So that brings us squarely down to this question of law that we argued here this morning.

Mr. Avakian: Well, your Honor, the point is this, as a part of the examination and as the preceding answer, he talked about—

The Court: That is what I am getting at. Are you committed, when you begin the examination of a witness and ask two or three questions and those questions might be said to cover a theory, are you committed to that theory or to that line all the way through your examination of a witness?

Mr. Avakian: No, I do not mean that, your Honor. But if I question a witness on apples and then on oranges and he said, "I don't know anything about oranges," then I produce an affidavit which talks about apples—I have already questioned him about apples and he has answered—what does an affidavit having to do with apples have to bear on the question he says he doesn't

know regarding oranges? My point is if the affidavit relates to share of business, it would be a proper question as impeachment. If the question relates to dollars and cents, the affidavit is immaterial; the books show, not the affidavit.

The Court: On the authorities stated, I am going to admit the exhibit.

Mr. Avakian: May we question Mr. Kyne on voir dire as to what he meant?

The Court: I am going to admit it. It is admitted.

Mr. Campbell: May we have a short recess?

Mr. Avakian: May I inquire on voir dire on the affidavit? We would like voir dire examination on it. That is customary practice, I believe.

The Court: I know, but this offer was made yesterday.

Mr. Avakian: And then the witness was withdrawn, and we would like voir dire examination in connection with it. No further question will be put to the witness.

The Court: All right. You may put him on the stand.

Mr. Avakian: For voir dire, and you will reserve ruling until the voir dire?

The Court: Yes, I will reserve ruling until the voir dire.

(Short recess taken at 1:20 a.m.)

OFFER OF PROOF ON CROSS-EXAMINATION OF WITNESS HARKNESS

Thursday, January 10, 1952, 1:00 P.M.

(In the Absence of the Jury.)

The Court: Now an offer of proof on cross-examination is what you propose to make.

Mr. Avakian: That is right; and may I say, your Honor, after that is made, there is an unrelated matter which will take only a moment of your Honor's time, which we would like to mention.

Through the cross-examination of the witness on the stand, we offer to prove, your Honor, these following matters which we believe are proper cross-examination of expert witnesses: First, that in the preparation of the 1946 partnership return of 110 Eddy Street, a deduction for salaries was taken in amount of \$22,450, whereas this witness' examination of the books show that the salaries total \$27,650. Secondly, we offer to prove through this witness that that difference in amount of \$5200—

The Court (Interceding): Let me ask you this—I do not want to interrupt, I don't intend to cut you off—you say that the return shows the matters that you desire to prove by this witness, is that what you mean?

Mr. Avakian: If you will let me finish my offer and see what I am driving at. That difference of \$5200 represents salary paid to one Frank Cavani, partner.

Next we offer to prove through this witness, as an expert tax accountant, that in the preparation of partnership income tax returns, the proper treatment of a salary paid to a partner is to exclude the salary from item designated "14" on the face of the return, Salaries and Wages, but to include that salary payment as distribution of profits for that particular partner in preparing Schedule I on the back of the return.

Further, we offer to prove that if this partnership return were prepared in a proper manner, from the viewpoint of tax accounting, from the figures shown in the books, Schedule I of the partnership return for the year 1946, which I believe is Exhibit 83, instead of showing a profit to Elmer Remmer of \$474.86, would show a loss of \$825.14; that that same schedule, instead of showing a profit to William Kyne of \$474.86, would show a loss to Mr. Kyne of \$825.14; that that same schedule, instead of showing a profit to Thomas C. Turner of \$474.86, would show a loss to Mr. Turner of \$825.14, and that with respect to Mr. Cavani that the schedule, instead of showing a profit of \$474.85, would show a profit of \$4374.86, and that the reported share of Mr. Remmer on Exhibit 83 actually was an overstatement by the sum of \$1199.99, in comparison with what the figure would have been had the proper tax accounting been used in preparing Exhibit 83 from the books and records which this witness analyzed.

Now in connection with that offer of proof, your Honor, I would like to renew my request that your

Honor permit us the scope of cross-examination of an expert in the matter of these tax accounting matters of salary.

The Court: Well, we will take up this offer of proof. As I understand it, this offer of proof does not concern any other matter embraced in the cross-examination. As I understand it is direct. The direct examination had to do, and all had to do, as far as I can see, is to show the source of this Exhibit 163.

Mr. Avakian: That is not all, your Honor.

The Court: Now you could prove these matters if you want to make this witness your own witness.

Mr. Avakian: Your Honor, this witness will also testify he made examination of these returns. That was direct.

The Court: Very well, but the purpose of this cross-examination, as I understand, is as to the reliability and authenticity of Exhibit 163.

Mr. Avakian: No, that is only part. He was assigned these particular returns for analysis and he testified that he examined these returns and these books. Now that is his testimony.

The Court: Yes, that is true.

Mr. Avakian: This offer of proof relates to his direct testimony that that was what he did.

The Court: Have you anything to say, Mr. Campbell?

Mr. Campbell: Yes, I submit these matters are not within the scope of proper cross-examination. This witness stated he had before him, when he

drew this schedule, these figures and returns. Some figures he drew from the books and where the books did not have figures, he took the figures from the returns. That is the entire, and in my opinion, all his testimony. The matters which counsel seeks to adduce, if true, can properly be adduced through his own case and through his own witness.

The Court: The offer will be rejected.

What is the other matter?

Mr. Avakian: When Mr. Schriber was on the stand, he was excused subject to call and the defense reserved the right to recall him and we would like to know if a time could be suggested agreeable to the Court and others to get him back up here.

The Court: That is a matter to take up with counsel and if you can not agree I will hear the matter.

**RE: CROSS-EXAMINATION OF
EXPERT WITNESSES**

Friday, January 11, 1952, 1:00 P.M.

(In the Absence of the Jury.)

The Court: I understand counsel desire to present some matter?

Mr. Gillen: May it please the Court, the matter that we desire to take up with your Honor, the defense is convinced that we are suffering irreparable harm in the case of the defense by reason of the rulings that have been given in regard to so-called expert witnesses.

We are just entering the stage of expert witnesses in this matter. The prosecution has introduced three, four, I guess, members of the office of the Internal Revenue Department. Three of them are accountants and one a certified public accountant and one man—I do not know whether Mr. Mooser was an accountant or agent in the particular type of work he was doing.

Now, may it please the Court, we feel that we have fallen short of appreciation here of the rules in regard to expert witnesses in whatever line they may be called as experts, and it is our opinion that a man who is either a public accountant or who is a certified public accountant more so, is in no different position as an expert in his particular field than a physician and surgeon. Now your Honor knows and must know particularly—I know there were some railroad cases tried here and that experts in the operation of railroads and mechanical matters are called as witnesses, and it is a fundamental rule that a witness may be examined first as to his qualifications, to determine whether or not he can depart from the hearsay rule and give his opinion, and thereafter if he presents testimony gives his conclusions. He may name, for example—I think the best illustration is that of a doctor—a doctor is called upon to examine a man who has been injured. The doctor might relate what he discovers about the man, relating symptoms, some of which may be objective, some subjective. He might, as to both symptoms, give his opinion, what they mean, how they occurred, what might be the prog-

nosis; then as to substantive symptoms, the ones the doctor must rely upon the patient for, the doctor gives his expression and opinion, whether they are sound, whether there is merit to the complaints made, and so on, and then he describes his conclusions as a result of his findings, both subjective and objective, as a rule, and then he describes what mode of treatment should be given and he might also be called upon to give a prognosis as to the man's future. Of course, your Honor realizes that he can then be cross-examined concerning any type of treatment that might be applied. He can be cross-examined as to symptoms that might have been present in the record by reason of testimony of some other expert, a symptom he might overlook, just like a certified public accountant might overlook a notation or particular ledger, and he can be asked if those matters were called to his attention would that in any wise change his opinion or change his conclusions. Or a doctor might be called upon to give expression to his opinion as to whether or not the treatment could be resorted to in another manner and whether or not, in his opinion, that would be better or worse or whether in his opinion that would change the picture from his point of view—the man is an expert—still using as illustration the physician or surgeon, a doctor may sit in the courtroom and listen to testimony of another man on the witness stand and then he might be called and asked on cross-examination, "Did you hear Dr. Jones," for example, "testify and do you agree with what Dr.

Jones said?" He might say, "I agree (or disagree) with Dr. Jones because I found a symptom Dr. Jones did not mention and if Dr. Jones had found that symptom or was cognizant of that symptom, his opinion might be as to what I figured. I would agree if the symptoms Dr. Jones found are true, but I found additional symptoms."

We have an illustration in connection with Mr. Mooser. He stated it was his opinion, from everything he had found that the rent of the 186 Club and various other accounts had been paid in cash. Then comes another expert, in the person of the gentleman who is now presently on the stand, a certified public accountant, and what does he say? He says he found record of running account of payment of rent and utilities by check through the Day-Night Cigar Stand, because the 186 Club did not have a check book and various accounts, including tax and social security payments, were made by check through the Day-Night Cigar Stand, which was debited to the account they carried in their books with the 186 Club.

Now, may it please the Court, it is true, as your Honor said this morning, one witness can not be called upon to pass upon the credence of another witness' testimony, but the fact of the matter is that that is not the rule with regard to experts, because an expert listens to the testimony of another expert and then gives his opinion and conclusion within the realm of his speciality or field. We know it is complete departure from the fundamental hearsay rules and everything else because

of the particular skill and experience and so of the expert, and it doesn't make any difference whether it is an account or a doctor or a dentist or even a lawyer, which is probably the most inexact science we can conceive of, but the fact of the matter is that anything that has been gone into the record, that appears in the record, can be put together into a hypothetical question or may be called upon for testimony from an expert from what he has heard another expert testify to and it is perfectly proper for us to probe those things.

Now your Honor has suggested to us from time to time, and particularly with reference to this gentleman and perhaps Mr. Mooser yesterday, you can call him as your own witness. Of course, your Honor knows in the first place we have to preserve a certain status until the conclusion of the prosecution's case, because for obvious reasons, and following your Honor's suggestion, we wouldn't be permitted to examine any witness at all by way of cross-examination, just sit and listen and then call the same or some other witness back to attempt to refute what has been established; something that is left before the jurors, the triers of the fact. It is an impression and if it is left there and no attempt to remove that impression, unless that particular subject, fresh in the minds of everybody, can be fully and completely probed at that time and any refutation be accomplished, it should be accomplished at that time.

We respectfully submit, your Honor, that an accountant who is called upon to examine books

should be in no different position than a doctor who is called upon to examine the body of a human being. The accounts sets forth, from what he has examined the symptoms and prescribes or adopts, for substantiation of the opinion that he is going to give, the way the matter should be treated and then he gives his conclusion and result of his examination. Absolutely no different from the doctor.

Now we feel that we should be—in fact, we are satisfied, your Honor, it is fundamental—we should be allowed to probe into any other matter of approach or to question upon past records in evidence. It must always be within the record. For example, Mr. Weaver, the other day, said because it was after a holiday, the first banking day, I believe the year was 1946, your Honor will recall, that Mr. Weaver said the account at the bank reflected a certain thing as of January 2nd. He said he didn't know, but he assumed the money must have been in the hands of the taxpayer on December 31st. It then developed he did not have in mind that particular business was open on a holiday, not closed like a bank, and Mr. Avakian attempted to pursue the probe by asking him, "Suppose it were open and a lot of business done on New Year's Eve, would that change your opinion?" and as a result of objections made, he was limited in his probe into that particular phase. Now we say he had just as much right, as if he were to say to a doctor, "Suppose, Doctor, that man did not have these symptoms or so on at a certain time, would that change your opinion?" and it reflected

an altogether different picture for the doctor. So we certainly urge that some consideration should be given to the very nature of these witnesses now—and I assume that we are going to have more—and we be permitted to probe from every possible aspect to determine whether or not they may not have found other things, if other symptoms are present and in that way then the jury is left with a set of facts that can be determined one way or another. We maintain, if the Court please, that this case is based entirely upon circumstantial evidence and your Honor knows when a case is based upon circumstantial evidence, in order for a conviction, then the circumstances must be said that they point only to the guilt of the defendant and not conceivable of any other rational determination. Now certainly if an expert accountant says, "The way I treated it * * *"—of course, here to start an accounts must set up certain ledgers with regard to accounts, so that he may be able to fit them into the picture—sometimes an account is not clear, as indicated here, and he has to set up a ledger, well, I assume this was done because of this reason. It might be wrong and it might be right, but he does the best he can at the time to set up some basis for him to inaugurate his diagnosis of the whole situation, and we feel, your Honor, that any the situation, any the factual situation, that might show alternative assumptions, based on the hypothetical questions or the facts in the case, should be left to the jury, so they may draw their conclusions with all of the other circumstantial evidence in the

case, and adopt whatever assumptions they think to be the reasonable theory, or to afford them an opportunity to determine whether or not there is some reasonable doubt in their minds because of the two theories that are equally conceivably the right theory.

We submit that matter to your Honor.

The Court: Let me make an observation. Supposing these exhibits which are summaries—I think those are the exhibits you have in mind.

Mr. Gillen: Together with other evidence, your Honor.

The Court: Suppose those exhibits, of which it might be said they are either deductions or assumptions or expressions of opinion or an expert witness—well, I really think your point is well taken as to that class of material.

Mr. Gillen: That is what we are addressing to your Honor, yes.

Mr. Campbell: I would like to be heard as to those exhibits, however, your Honor. I think if your Honor will recall the evidence, and let us take the last when Mr. Harkness was still on the stand. He was not asked on direct examination for any opinion or conclusion whatsoever. His testimony was entirely elicited.

The Court: I do not want to interrupt, but I want to understand that statement. But the exhibit which was introduced in evidence, pursuant to his direct examination, contained within it assumptions and deductions, not merely extracts or copies or transcripts from records—

Mr. Campbell: That wasn't his testimony, your Honor.

The Court: But the exhibits themselves—he arrived at certain items or statements contained in Exhibit 164 that were not copied from the book or records but were the result of some deduction of his, isn't that true?

Mr. Campbell: No, I do not believe that to be the case, your Honor.

The Court: Is that your point, Mr. Gillen?

Mr. Gillen: Your Honor has my thought exactly.

The Court: I do not mean to interrupt, but I want to get started thinking.

Mr. Campbell: As I see the situation and understand the evidence, first as to direct examination—he stated, in response to questions, that this summary had been drawn from specific books which are in evidence and specific records which are in evidence, that these represented the accounts and figures in the books.

Now on cross-examination he was asked if, in addition to the book, if there was anything in the record which also substantiated—this was as to cross-examination—and he said, "Yes, I heard the testimony of Mr. Kyne," and his direct testimony led to the introduction of the document and Mr. Harkness identified that and said the figures in that were drawn from the records which were identified as being in evidence here and did not represent his conclusions or opinions. He did not state whether, in his opinion, those entries were correct.

He did not state in his opinion, as a certified public accountant, except possibly on cross-examination, but not direct examination, he did not state that as an accountant those were improper entries or that the entries were false in any regard. He was simply asked to put into evidence, in a schedule form, that which was contained in the exhibits which have been produced here.

Now your Honor permitted, and has permitted, the fullest and widest latitude in cross-examination as to the sources from which he got that figure, as to the total, where he had total accounts in the books, and that is not a matter of conclusion, it is a matter of mathematics, which can be done by the jury, Court or counsel, as well as by a witness and a witness in this case and in connection with this type of evidence, is only used for convenience and assistance, rather than compelling the jury, or asking the jury, to take the books themselves and make the additions and put them down in the schedules, so that this is in a shorter and more concise form than going through a lengthy ledger.

Now I agree, if we were asking for opinion as to the accuracy of the books, as to the handling of matters on the books, as to classifying of accounts, whether proper or improper, as to entries of partnerships that were set up in there, which are matters of opinion and would be matters of opinion, then I would agree that they were testified as expressions and would be subject to all examination of expressions, but under the circumstances of this case, at this point, these men have

not called upon for opinion at this stage, they have only been asked what do those records show as to those accounts, which for convenience have been put on schedules and introduced, and under those circumstances I do not agree with counsel.

Now so far as passing on testimony which counsel pointed out some discrepancy between Mr. Mooser and Mr. Morgan, I submit that is not the case. Mr. Mooser testified he went in and examined the records of the 186 Club, not of the Day-Night Cigar Store. He did not examine those, only the 186 Club. He said their expenses were paid in cash through the Day and Night bank account. Mr. Morgan's testimony is in harmony. He said the 186 Club expenses were paid by check by the Day-Night Cigar Stand and they were reimbursed in cash by the 186 Club, which is substantiation of Mr. Mooser. As a matter of fact, the 186 Club did pay expenses in cash because some they paid to the Day-Night and I presume some they paid direct, but there is no difference there. Nor was Mr. Morgan testifying in the roll or capacity of an expert to pass upon the weight or the credence to be given to any other witness. That is a matter within the province of the jury, as one of the instructions, that they are the sole judges of the weight to be given and the credibility to be given the witness, and I submit, your Honor, that in the orderly procedure of this trial, that your Honor's rulings have been correct under the law, that the cross-examination in the first place must be con-

fined to the scope of direct examination, that unless an opinion is sought and received in evidence, then, and not until then, would the rules which Mr. Gil-
len refers to as to expert testimony apply. Now take the situation of a doctor which he refers to. Medical testimony, of course—

The Court (Interceding): May I ask a question? Take this summary, 164. The purpose of it is, as you stated, to get into a narrative and easily accessible form the effect or contents of a great many books and records. Not so far as an item in the summary can be traced down to an item in a record, we have no opinion or deduction.

Mr. Campbell: That is my position.

The Court: But suppose there is an item or two here in this summary that he adduces from a fact that there was not something entered at a certain time and something else was carried into it. We have heard of those situations. I am going to ask Mr. Avakian, or any one of counsel, let us get in our minds some of these questions which this court has ruled against you on and let us see if they can be said to come within the category of an opinion. If any of these witnesses in any of these exhibits have an item which is not set forth on the account, but is the result of his opinion of what that account means, or what the item is by some expert knowledge of his or knowledge of accounting, then I think we ought to pursue the same line of cross-examination as to any other witness, so let us look at some of these questions of which counsel seem to feel the ruling should have been otherwise. I

would like to hear them and examining them in that light, I am willing to retract and let you go ahead with it.

Mr. Avakian: I can give you two examples, your Honor, if I may have 163. Exhibit 162 is Mr. Harkness' exhibit and he shows, for example, at the end of 1946 certain amounts as capital accounts as per books at December 31, 1946, of the various partners. Now let us bear in mind this, your Honor, as a preliminary statement, that when the witness presents a summary of this kind, he is not only stating these particular items are figures that are found in the book, but he is also stating that these figures represent what the book show as to capital accounts of these partners and that also involves then, your Honor, an analysis of the various entries in these various books to determine what is material and relevant in determination of the amount of the capital account. Now in this particular example that I am using, we find that capital account shown on Exhibit 163 for the partners at the end of 1946 did not include any allocation of profit or loss for the year 1946. Now Mr. Harkness testified that a capital account, to be correct, should include the profit and loss both and it further developed in my cross-examination on January 1st—or maybe the 2nd, but on the following January—an entry was made in the books crediting the 1946 profit, so that from the books themselves he had available the data which would have made a correct figure to enter into this exhibit under his statement of what is correct, so that it would have

been proper then to show that, instead of using December 31, 1946, capital account of the partners, the last entry that was made in 1946, he should have included the entries made in the books early the next year to reflect the 1946 profits. Furthermore, your Honor, the books themselves show what the profit or loss for the year was, according to the books, the books that he used.

Now your Honor will remember in connection with my offer of proof I stated in the preparation of the return, whoever prepared the return, overlooked a \$5200 salary payment made during the year 1946 to Cavani. Now that payment showed in the books, so had he used the data shown in those books in a different way from the way he used it, he would have come up with a different answer. Now, I wasn't asking him to speculate as to things not in the record. I wasn't asking him to speculate as to things that were not in the very books upon which this exhibit was based. I was simply asking him if, instead of picking out the particular figures from the particular page of these books that he did pick out, had he used other figures that are found in that book and made a proper accounting treatment of those figures—not picking figures out of the air—but making a proper accounting analysis of the figures that were in the books themselves, what answer would he have come up with. That is what was involved in my offer of proof. That, your Honor, is where we disagree with Mr. Campbell, that they are simply summarizing the books.

Now if the books themselves which were used, would support a different answer than the one in the exhibit, we feel we are entitled to show that, so that when the jury decides the facts, if it decides to interpret the facts in this direction, it will know what Mr. Harkness' conclusions would have been as to the amount of capital account. If it decides to interpret this way, it will likewise know what Mr. Harkness' opinion and conclusion was on that interpretation of the facts. That is all we are getting at, your Honor, and I do not think that we should be limited in treating these people as expert witnesses, when in fact they are presenting testimony which represents conclusions on accounting questions, which we can not expect the jury themselves to work out. You might say an expert witness is one who is called for the purpose of putting together for the jury difficult and complex matters, on which the jury has not either the experience or ability to reach completely, questionable conclusions without some assistance.

Mr. Campbell: I would like to answer that. I think Mr. Avakian's statement pretty well answers itself in this record. Mr. Harkness was asked to put on this sheet, and he stated that he had, the capital accounts as shown on the books as of December 31, 1946, and from Mr. Avakian's statement, that is exactly what he put in. He made no adjustment. Mr. Avakian is attempting to argue with him that when he makes this summary, which only purports to be a summary of what the books show, that he should make adjustments as an ac-

countant. He wasn't asked to make adjustments; he was asked to put down what the books show as of that date. I submit if the defense contends that the books should have been adjusted, they are at liberty to produce evidence in that regard, but Mr. Harkness was not asked if in his opinion did these capital accounts correctly reflect the capital of these various individuals, and I have no doubt that counsel would object to that immediately.

The Court: Let me put this thought to you—probably it is crudely expressed—if there is any item of figure in that summary and it has a certain designation and it can not be found in the same designation in one of the records, I would say that the defendant could go into that and treat that as an opinion of an expert?

Mr. Campbell: Yes, sir.

Mr. Avakian: But I recall exactly that situation, your Honor. Page 1966 of the transcript, I was questioning Mr. Harkness on Exhibit 163. Mr. Harkness had an entry in the account of Mr. Kyne of \$4985.44, and the last date in the account showing that the balance was May 31, 1945. There were no further entries in the account after that date, yet Mr. Harkness used that figure in Mr. Kyne's capital account as of December 31, 1946, and I asked this question, and I am at line 15, page 1966—

The Court: Don't pass one ruling that you will probably say was correct—I found a ruling in your favor, so you don't want to overlook that.

Mr. Avakian: We appreciate every ruling in our favor. The question was:

"Q. Now would you eliminate—and I will give you a sheet of paper if you want to work this out—would you eliminate from Exhibit 163 the item of Wm. E. Kyne, trustee account, \$5,985.44, as of December 31, 1946, and tell me what the total of the capital accounts would then be?"

"Mr. Campbell: To which I object as not proper cross-examination.

"The Court: Objection sustained.

"Mr. Avakian: Aren't we entitled to see what the result would be if he had not made the assumption he did?"

"The Court: That is a matter not within the scope of direct examination. It is a matter of calculation.

"Mr. Avakian: It is a matter of testing what the results would be if he had not made the assumption that he made."

The Court: Stop a moment. Let me look at that please. I don't see how I can go along with you on your contention in regard to that question.

Mr. Avakian: Because, your Honor, he assumed a figure that was entered as of May 31, 1945, represented the balance of that account on December 31, 1946. Now there was no entry as of December 31, 1946. The last entry in the account was May 31, 1945.

The Court: You could ask him on cross-examination, go into the reason why he made that deduction, but to ask him to accept your theory and then figure out the exhibit to suit your theory by it, is a different thing.

Mr. Avakian: That is plain if the evidence would support two interpretations, one that it was still there on December 31, 1946, and the other it wasn't.

The Court: He testified the item was there May 31, 1945, but he said he treated it as if carried all the year through.

Mr. Avakian: A year and a half later.

The Court: And you might inquire as to his reason for so assuming, but to go farther and ask him to accept your theory and work a mathematical problem here to the jury on your theory, I can't see where that is proper.

Mr. Avakian: That is exactly the same as asking a doctor, did you make a certain assumption in your examination of this patient, and he says yes. Maybe the testimony in the record would permit another interpretation which would make that assumption incorrect, then it is proper to say, "Now, Doctor, if you had not made that assumption, what would your diagnosis have been? Would it be any different?" To the extent that the witness has relied upon his experience as an accountant in drawing certain conclusions and to the extent that the jury might properly conclude that his assumption was wrong and something else was true, it is proper to ask the alternative question—if your assumption is wrong and the fact is this way, what would your conclusions be, and then the jury has before it the conclusions of this expert on both alternatives.

The Court: If you have a doctor on the stand

and he gives his opinion as to the cause of an injury, you are examining first what he bases that upon, objective or subjective symptoms.

Mr. Campbell: I think it is a matter of common knowledge to all of us, not requiring an expert and not calling for conclusions, that when an accountant leaves open a particular date that then that record shows the balance would be the same, just like our bank accounts. We might make our last deposit in our account on December 15th and our last withdrawal made December 20th, and yet the balance would be the same.

The Court: The question was, what should the doctor prescribe or do for a certain condition or injury. Then you ask him if a certain symptom had not appeared, what would he prescribe for the patient? That is what this amounts to.

Mr. Gillen: May I give your Honor a very familiar illustration that your Honor has probably encountered in railroad cases? A doctor has examined a man injured on the railroad and the doctor will assume or draw his information as to certain symptoms—the man suffered pain down his right leg, and the doctor says, "I assume, because you have no other history of previous injury or anything else, that all this pain comes from this injury" he received on a certain date. Then comes along cross-examination—"Doctor, if you were informed that a year and a half before this man fell off a locomotive and at that time suffered a fractured rib, and so on, would your diagnosis be different?" Of course, that brings into play another

symptom that the doctor wasn't aware of or another set of facts that are existing and of course nine times out of ten that will change the doctor's opinion, or in other instances, the doctor will ask questions back and forth and say, "No, I do not think that injury would bring about the symptoms that now appear."

The Court: I agree with you, but I don't think that applies to the ruling shown in line 13, page 1966, of this transcript. I still think the ruling to that question is correct, that ruling beginning on line 13.

Mr. Avakian: The objection, of course, was based on the ground it is not proper cross-examination and it is an assumption which he obviously made, because there is no entry in the book subsequent to that date, so—

The Court: You want the jury to accept your theory and then work out the problem on the basis of your theory?

Mr. Avakian: No, it is not a mathematical question. It isn't asking the witness to accept as true the hypothetical statement. All it is stating is if the facts are accepted as different by the jury, which is to decide the facts, what would your opinion be?

The Court: You are asking the witness to accept your theory and work out a problem?

Mr. Avakian: That is right. That is not binding on anybody.

Mr. Gillen: We did that hypothetically when the doctor gives his opinion from his own findings

and then takes this set of facts and decides what his opinion would be under those circumstances.

The Court: Well, what will we do now, proceed?

We will bring in the jury.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled United States of America, plaintiff, vs. Elmer F. Remmer, defendant, No. 12,177, at the trial of the case commencing November 28, 1951, and that the foregoing pages comprise a true and correct transcript of my said shorthand notes, to the best of my knowledge and ability, of arguments held during the trial in the absence of the jury on December 12, 13, 18, 27, 28, 1951, and January 3, 9, 10, and 11, 1952.

Dated at Carson City, Nevada, January 22, 1952.

/s/ MARIE D. MCINTYRE,
Official Reporter.

[Endorsed]: Filed January 23, 1952.

[Title of District Court and Cause.]

HEARING ON DEFENDANT'S MOTION FOR BILL OF PARTICULARS

Be It Remembered, That the above-entitled matter came on regularly for hearing before the Court at Carson City, Nevada, on Friday, the 15th of June, 1951, the defendant not being present in court but represented by his counsel, John R. Golden, Esq., and the plaintiff being represented by Bruce R. Thompson, Jr., Esq., and Walter M. Campbell, Esq. The following proceedings were had:

Mr. Golden: I have here a memorandum of points and authorities I would like to hand the Court.

This is motion for bill of particulars made under Rule 7(f) of the Rules. At the time of the arraignment, your Honor read the indictment carefully, but may not recall that it simply alleged that as of each year the defendant wilfully, etc., understated his income in a specified amount and failed to pay income tax in a specified amount. There is no detail whatsoever. Now the old form of indictment, before the new rules, had something the appearance of an income tax return to show the income from various sources, that is, earnings, rents, royalties, what not, and it showed the exemptions and deductions and what the government said the income should be. The new form of indictment simply says—

The Court: The defendant is present?

Mr. Golden: No, he is not.

The Court: Is there any question about the propriety of proceeding here without him?

Mr. Golden: Well, the situation is this—at the time we were here for the arraignment, I asked the Court whether he need to be present and your Honor reserved decision on that and then when I had some correspondence with the clerk regarding a hearing date, I again asked the question and I assumed, I think, from my letter, if I didn't hear to the contrary, he need not be here. So far as we are concerned, we will waive his presence and there never will be any question about raising it, I assure you.

The Court: Any objection on the part of the government?

Mr. Thompson: No, we have no objection.

The Court: Very well.

Mr. Golden: In other words, your Honor, there is nothing in the indictment here to show whether the defendant did not return all his income or whether he overstated his deductions. There is nothing to show the nature, source or amount of any item claimed in the indictment to be increased or decreased or the type deductions, whether allowed or disallowed, and nothing to show whether the income which the government claims the defendant receives is reflected in his books or not, and if not, where it might be reflected. The position is the same as in a civil case. If the plaintiff in a civil case were to sue the defendant for one thousand dollars for goods sold and delivered, the

defendant would be entitled to bill of sale, assuming the merchandise was shoes, at such and such a price. That is what we want. We need a bill of particulars in an effort to make this trial run smoothly, to permit us to prepare for trial and, of course, in addition to protect us against second prosecution for the same offense, which could well be had were there not a bill of particulars, because there is nothing to identify these sums of money and the cases, as cited in the memorandum, your Honor, show that under these circumstances we are entitled, as a matter of right, to such a bill.

Now I know we are not entitled to the evidence. We are not asking for evidence. We want to know, for example, whether the government claims that the defendant received in such and such a year such and such income from such and such an enterprise of his. We do not know whether they have a witness who will say that was the money, or another witness who will say, "I made up the books," or "I was told to make an erasure in the books," or something of that sort. We do not care what their evidence is, but we want to know on what they are going to proceed. If the particulars to which we are entitled happened to disclose some evidence, under the case cited under paragraph 5, nevertheless we are entitled to it. Although we are not entitled to evidence, the fact that the information may include evidence, would not preclude us from getting it. I have cited a number of cases, your Honor, in which the courts have held that we are entitled to a bill, and in particular I have set out

at length in the memorandum an opinion of a district judge, Judge Reeves of Missouri, in full because I am not sure whether it is shown in the official reports, and commencing on page 3 of the memorandum that sets out very fully an opinion which is typical of the cases.

Now these matters, of course, are in your Honor's discretion. If this defendant were charged with a particular single transaction such, for example, as unlawful extracting gold bullion, then I would say we would not be entitled to a bill of particulars as to the details of the transaction, because he would know those things himself, and there have been cases in which defendants have asked for those particulars in such circumstances. However, in these tax cases there is no case which I have found which does not give the defendant the information which we have asked for in the bill of particulars.

The indictment in the Kelly case, your Honor, is practically word for word like the indictment in this case. The indictment set forth on page 4 of the memorandum, it says: On or about a certain date the defendant did wilfully and knowingly attempt to defeat and evade, and so on, a large portion of the tax by filing with the Collector of Internal Revenue a false and fraudulent return, and so on:

“* * * wherein he stated that his net income for said calendar year was the sum of \$5,017.42 and that the amount of income and victory tax due and owing thereon was the sum of \$890.46, whereas, as he then and there well knew, his

net income for the said calendar year was the sum of \$33,855.33, upon which said net income he owed to the United States of America an income and victory tax of \$15,621.72."

Apart from the figures and the years, the indictment is practically the same and Judge Reeves analyzed the authorities exhaustively and closed by saying that:

"The obligation is upon the Government, either in the indictment or by a bill of particulars, to inform the taxpayer concerning the facts employed as a basis for a charge of income tax evasion."

Now I do not know whether your Honor will agree with me or not, but I think that is sufficient for the moment, until we get into the detail of what I believe we are entitled to and your Honor may wish to hear from Mr. Campbell first on the general proposition.

Mr. Campbell: Possibly I should identify myself. My name is Walter M. Campbell, Jr. I am regional counsel, Penal Division, Bureau of Internal Revenue, and I have heretofore been appointed Special Assistant to the United States Attorney to assist in the prosecution of this case and the official appointment has been filed with the clerk of the court.

The Court: I think when we were in court before it was suggested that Mr. Golden and Mr. Pike should confer on certain matters that should or should not be agreed upon. Was there such a conference?

Mr. Golden: No, your Honor. The chronology of the matter is this. I heard nothing whatsoever—we were here on April 27th and on May 11th I wrote to Mr. Pike and asked him to give me some word as to his intentions.

The Court: I wonder if we could recall—would it show in there what those matters are? I was inclined at that time that I thought the defendant ought to have some of those specified matters and I thought that we could work out by agreement with Mr. Pike. It might be worth while to see what they were. Maybe we could get some kind of understanding on this.

Mr. Campbell: I may state, your Honor, prior to that date we have had a number of conferences relative to these matters, I believe in Mr. Pike's office, shortly before the indictment was returned, and it was my opinion, expressed to Mr. Pike, that we should have an order of the Court, because we did not believe that what we would voluntarily supply to Mr. Golden would probably satisfy him, as I told Mr. Golden orally the other day.

The Court: Perhaps we could be in this situation—could you state at this time the extent of the matters which you would not object to if the Court made an order?

Mr. Campbell: Well, we are in this position, your Honor—as Mr. Golden is aware, the government's case here is what is termed a net worth case. The income which the government alleged was received by the defendant, net income and not reported, is represented by actual figures and net

worth, comparing his assets at their cost at the beginning of the year and the assets held at the end of the year at their cost and excluding non-income sources. In support of that, of course, the defendant had various enterprises, some of which had books and records and some of which we have found no books and records. To disclose the exact nature of the government's case; that is, to provide a net worth statement, would, of course, disclose evidence which does support the government's case.

Now all of the requests of the defendant, in his motion for bill of particulars goes to pertinent facts, with the ex-deductions. Of course, they are not applicable, I believe, in a net worth case, because all expenditures have already been eliminated during the course of the year when the net worth of the defendant was ascertained at the end of the year, with the exception of outstanding liabilities which, of course, must be given weight.

I might add this statement, your Honor. During the course of these many conferences we had offered, prior to the indictment, to make available to the defense a copy of the government's income statement, if the defense would also supply the government with a net worth statement and the defense's position was that they were unable to do so because of accounting difficulties and lack of funds, I believe, with which to complete their accounting. Of course, the matter of granting or refusing bill of particulars is undoubtedly within the discretion of the Court and the extent to which a

bill of particulars will be given is within the discretion of the Court. However, we feel that many of the requests made here, in view of the nature of the government's case, are not requests which can be met, because they are not applicable to the theory of the government's case, which is that of net worth case, and which is almost always the situation where inadequate books and records were maintained or made available to the government.

I do not think there is merit in Mr. Golden's point of the possibility of the defendant being placed a second time in jeopardy on the same charges. The gravamen of the offense in each count is that for a certain calendar year he attempted to defeat and evade a large part of his income tax. The decisions, of course, hold that the government need not prove a specific amount set forth in the indictment, so long as a substantial amount of understated income is proved a combination, so we think under such an amount as here would bar any further prosecutions with respect to his income tax for that particular year.

Now, of course, we will provide to the defendant whatever the Court deems proper should be given to him. However, these are all matters which are, of course, peculiarly within the knowledge of the defendant, who knows more about his income and sources of his income than any one else. The leading court case, of course, on the matter of the court's discretion, is that of *Wong Tai vs. United States*, reported in 273 U. S., page 77, and particularly from page 82, wherein it is stated:

"The application for bill of particulars was one addressed to the sound discretion of the court, and, there being no abuse of this discretion, its action thereon should not be disturbed."

Now I am familiar with the opinion by Judge Reeves, which is cited in the memorandum of points and authorities. However, the tendency in the district courts here in the Ninth Circuit, so far as I have observed, and I have personally participated in all of these cases in the Northern District of California, has been where the taxes involved are those of the defendant or of the entity of which he is a party, that request for those particulars have been denied. Of course, however, there are no written opinions by the various judges on that subject and, as I say, it is a matter solely within the discretion of the Court.

The Court: Mr. Golden?

Mr. Golden: Your Honor, regardless of any possibility of double jeopardy, the other main reason for the bill of particulars is so the defendant can prepare his case.

Now Mr. Campbell has told your Honor that this is a net worth case, that the defendant has a number of enterprises, that there are books for some of them and not books for others, and at the same time he says these matters are peculiarly within the defendant's knowledge. Now that is not consistent. The defendant can't know, for example, if the ~~government~~ says in the beginning of 1944, the first count of the indictment, which is the year

1944, the defendant returned an income of \$9500, when he should have returned an income of 33 thousand plus, now that does not tell the defendant anything. The government may say at the beginning of 1944 his net worth was zero or a million dollars or any other amount and at the end of 1944 it was a number of \$33,934.61 more than that. It doesn't give him anything to go on at all, and we say we are entitled to know, if he has a net worth case, what net worths they are using. That is not divulging any evidence. We want to know what net worth they use for the start of the period. We want to know what the items are which make up that net worth. We want to know what acquisitions or receivables there were of each year which the government claims increased the net worth or constituted income. For example, if they say this man received ten thousand dollars from Cal-Neva or the Menlo Club in San Francisco, that isn't divulging any evidence. That is just telling us what they are going to try to prove. It may be if he is prepared that he can show that ten thousand dollars received from Cal-Neva was not income, but was a loan or repayment of debt, or whatever it may be. In other words, if we come in here the way this stands and went to trial tomorrow, we wouldn't have the remotest idea. As Mr. Campbell knows, this defendant has been connected with a number of different enterprises; the government has most of his records. They have permitted us to look at them at the government premises and we have, to some extent, looked at them, but by telling you it is a net

worth case, he tells you that they are not relying upon those records.

As far as the offer to exchange net worth statements is concerned, that is not material here. There were reasons why we could not accept that offer, and furthermore, the government would not be bound by any such offer made to us unless by any such statement he could say it was given to us in response for a demand for bill of particulars and even then they can at any time amend their bill of particulars any time before the trial at least, if not during the trial.

If I may respectfully suggest so, your Honor, I think your Honor is absolutely right in stating that we are entitled to something in the face of this indictment. I think we ought to get down to brass tacks, as the saying is, and see just what it is your Honor is prepared to order that we receive. We take up the demands one at a time—

The Court (Interceding): You made a statement here in repeating Mr. Campbell's statement, the government is not relying upon the records. It would follow from that that if a bill of particulars was given, there is a question whether it would be almost impossible to give that statement without disclosing evidence.

Mr. Golden: I do not think so, your Honor. For example, this is what I had in mind and slipped my mind a minute ago. In the civil assessment made against this defendant by the government for these same years, one of the bases for those assessments is that he considered certain enterprises to

be partnerships and the government says they are not partnerships. Now that is in a civil matter. In this criminal matter, we have been told officially in conferences that that is not any part of the basis of the criminal case, that the criminal case is simply on a net worth case, and we are absolutely in the dark as to any of the things which the government might claim here. They do not have to tell us the evidence to give us the net worth, they only have to tell us what was the result of their evidence would be.

The Court: Let me make this observation. In Count 1 of the indictment it is charged that the reported net income was \$9500.

Mr. Golden: Yes, your Honor.

The Court: I would take it that that is what the books disclosed and was the actual report made in the return and perhaps supported by the books, but in view of the statement made by Mr. Campbell, and in view of your repetition of that statement, that the government is relying upon matters not in the books, to disclose any facts concerning that couldn't be done without disclosing the evidence.

Mr. Golden: Yet if your Honor will look at this Kelly decision of Judge Reeves, the same thing arose. At the bottom of page 7, your Honor, the court states what the government's memorandum was in that case. It says (Paragraph 3, line 23):

“* * * it is to be noted from the briefs of counsel for the government that:

“‘The defendant was engaged not only in the liquor and grocery business, but also in

farming activities, real estate speculation, and rental of real estate. The defendant failed to present accurate and complete books and records covering all of these business activities for inspection by examining officers of the Bureau of Internal Revenue at the time of their investigation of the defendant's returns for the years involved. Due to the incompleteness of the defendant's books of accounting and records regarding all of these business activities, the examining officers, pursuant to Section 41 of the Internal Revenue Code, to determine the taxable income of the defendant for the years covered by the indictment, were compelled to resort to the records of various banks in which the defendant had made deposits, or had otherwise transacted business, plus expenditures evidenced by his returns or acknowledged by him.'"

That is what the government said in that case. Then the Court says:

"It was of course proper for the government to obtain information in this way and the courts have upheld such procedure and, as noted, the evidence thus obtained is competent. However, this is information that may or may not have been available to the defendant. Apparently his books did not disclose these facts. Under such circumstances and from an examination of all of the authorities the obligation is upon the government, either in the indictment or by a bill of particulars, to inform the

defendant concerning the facts employed by it as a basis for a charge that defendant had evaded or attempted to evade his income tax."

Now I say very sincerely, your Honor, we are not asking them to tell us who their witnesses are going to be or what they are going to testify to or what documents they are going to bring in here. All we are asking them to tell us is what they expect and hope to prove as the net result of all the testimony; namely, started out with such and such net worth, composed of such and such items on the cost basis, as Mr. Campbell says, and during the years in question he accumulated income at such and such time from such and such places and such and such amounts, giving him a resulting higher net worth. That is all we are asking for and that does not give us any inkling as to how they are going to prove it. If they say they are going to show in the year 1944 he got a check from Cal-Neva for ten thousand dollars, that doesn't tell us what man is going to come in here and testify against him or what they are going to claim that the prosecution—I don't mean that exactly—let me put it this way—suppose we knew they were going to claim a ten thousand dollar receipt and suppose we built up a defense explanation for it and they had something that would knock that explanation out, they do not have to tell us that, but they do have to tell us what we have to meet. That is our position.

The Court: In Judge Reeves' decision I notice this, Judge Reeves' opinion:

"Due to the incompleteness of the defendant's books of accounting and records regarding all of these business activities, the examining officers, pursuant to Section 41 of the Internal Revenue Code, to determine the taxable income of the defendant for the years covered by the indictment, were compelled to resort to the records of various banks in which the defendant had made deposits or had otherwise transacted business, plus expenditures evidenced by his returns or acknowledged by him."

Now that was the statement from the brief of government's counsel. The Court goes on to say:

"It was, of course, proper for the government to obtain information in this way and the courts have upheld such procedure, and, as noted, the evidence thus obtained is competent. However, this is information that may or may not have been available to the defendant."

I can not understand that reasoning. If a man makes a deposit in the bank he would know it.

Mr. Golden: Yes, if he made it himself and somebody did not make it for his account. But suppose a man is passing through and stops in a bank and breaks a thousand dollar bill because he does not want the government to know he has a thousand dollar bill and five years later he is indicted and the government is going to bring in a witness to testify to that transaction. We do not want to know that, that would be evidence, but we do want to know what they claim is his income and the deductions.

The Court: The thought I have in mind is it would be impossible to order a bill of particulars here which would not include within its contents evidence. The motion for bill of particulars is denied and the state of the record is that the defendant has heretofore entered a plea of not guilty to all the counts in the indictment, is that correct?

Mr. Golden: Yes, your Honor.

The Court: And the case is set for trial in this court November 7, 1951.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had at the hearing on Defendant's Motion for Bill of Particulars in the case entitled, *United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant*, No. 12,177, held at Carson City, Nevada, on June 15, 1951, and that the foregoing pages, numbered 1 to 17, inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, January 24, 1952.

/s/ MARIE D. MCINTYRE,
Official Reporter.

[Endorsed]: Filed January 25, 1952.